TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 318

EMPIRE TRUST COMPANY, PETITIONER,

vs.

CHARLES HAZLITT CAHAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 17, 1926

CERTIORARI GRANTED APRIL 26, 1926

(21,776)

(31,778)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

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EMPIRE TRUST COMPANY, PETITIONER,

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CHARLES HAZLITT CAHAN

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Writ of Error on Behalf of Empire Trust Company.

United States District Court

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
Defendant.

The President of the United States to the Honorable Judges of the United States District Court for the Southern District of New York, Greeting:

Because in the record and proceedings and also in the rendition of the judgment on a complaint which is in the said United States District Court for the Southern District of New York, before you, or some of you, between Charles Hazlitt Cahan, plaintiff, and Empire Trust Company, defendant, a manifest error has happened to the great damage of the said Empire Trust Company, as by its answer appears.

We being willing that error, if any has been made, should be duly corrected and full and speedy justice done to the parties aforesaid in that behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you

send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this writ, so that you may have the same in the said United States Circuit Court of Appeals for the Second Circuit at New York within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct the error, what of right and according to the laws and customs of the United
5 States should be done.

WITNESS, the Hon. William H. Taft, Chief Justice of the United States, the 2nd day of February, in the year of our Lord One thousand nine hundred and twenty-five.

ALEX. GILCHRIST, JR.,
Clerk of the United States, District Court for the Southern District of New York.

U. S. D. C.
Writ allowed.
2/2/25. AUGUSTUS N. HAND, *D. J.*
6 A. G. Jr.

Writ of Error on Behalf of Charles Hazlitt Cahan.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
Defendant.

The President of the United States to the Honorable Judges of the United States District Court for the Southern District of New York, Greetings:

Because in the record and proceedings, as also in the rendition of the judgment on a plea which is in the said United States District Court for the Southern District of New York, before you, or some of you, between Charles Hazlitt Cahan, plaintiff, and Empire Trust Company, defendant, manifest error hath happened to the great damage of the said Charles Hazlitt Cahan, plaintiff, as by his complaint appears.

We, being willing that such error, if any hath been made, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the

Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, and file in the Office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, on the 10th day of April, 1925; that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States ought to be done.

11 WITNESS, the Honorable William H. Taft, Chief Justice of the United States, this 11th day of March, in the year of our Lord One Thousand Nine Hundred and Twenty five.

ALEX. GILCHRIST, JR.,
Clerk of the United States District Court for the Southern District of New York.

The foregoing writ is hereby allowed.

JNO. C. KNOX,
U. S. District Judge.

A. G., JR.

12 Dated, New York, March 11, 1925.

Summons.

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN
against
EMPIRE TRUST COMPANY.

L 22—266.

To the above-named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your 14
answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New
(Seal) York, at the City of New York, this 27th day of July, in the year one thousand nine hundred and twenty.

ALEX. GILCHRIST, JR., 15
Clerk.

HUGHES, ROUNDS, SCHURMAN & DWIGHT,
Plaintiff's Attorneys,
Office and Post Office Address,
100 Broadway,
Borough of Manhattan,
New York City.

16 **Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
Defendant.

17

The plaintiff herein, by Hughes, Rounds, Schurman & Dwight, alleges, upon information and belief:

I. That the plaintiff is an advocate and attorney-at-law, residing and practicing his legal profession in the City of Montreal, in the Province of Quebec, in the Dominion of Canada, and is a citizen of Great Britain.

II. That the defendant, Empire Trust Company, is and at all times hereinafter mentioned, was a corporation organized and existing under the banking law of the State of New York and engaged in the
18 banking business in the Borough of Manhattan, City of New York, and is a citizen of the State of New York.

III. That the controversy in this suit is between a citizen of a State of the United States and a citizen of a foreign State and that the matter in suit herein exceeds, exclusive of interest and costs, the sum and value of $3,000.

IV. That during a considerable portion of the years 1915, 1916 and 1917, the plaintiff was temporarily employed in the City of New York and had a temporary residence there and that at the times hereinafter mentioned during said period, the plaintiff had a bank account with the Agents of the Bank of Montreal in the City of New York and a bank account with the Guaranty Trust Company of New York.

V. That on May 29, 1916, the plaintiff, for the purpose of facilitating payment of his personal expenses and liabilities, executed a power of attorney nominating and appointing C. H. Cahan, Jr., as attorney of the plaintiff for, in the name and on behalf of the plaintiff to make, sign and draw checks on the plaintiff's said account with the Agents of the Bank of Montreal, in the City of New York, during a period of two months from said date, which said power of attorney was forthwith deposited with said Agents of the Bank of Montreal, at their office in said City of New York.

VI. That on July 29, 1916, the plaintiff, for the same purposes, executed a similar power of attorney nominating and appointing said C. H. Cahan, Jr., as attorney of the plaintiff for, in the name and on behalf of the plaintiff to make, sign and draw checks on the plaintiff's account with said Agents of the Bank of Montreal, in the City of New York, during a period of three months from said date, which said power of attorney was forthwith deposited with said Agents at their office in New York City.

VII. That on October 30, 1916, the plaintiff for the same purposes executed a similar power of at-

torney nominating and appointing said C. H. Cahan, Jr., as attorney of the plaintiff for, in the name and on behalf of the plaintiff to make, sign and draw checks upon the plaintiff's account with said Agents of the Bank of Montreal, in the City of New York, without any restriction as to time, which said power of attorney was forthwith deposited with said Agents at their office in said City of New York.

VIII. That on September 21, 1916, the plaintiff, for the same purposes, executed a power of attorney, constituting and appointing said C. H. Cahan, Jr., 23 attorney of the plaintiff, in the name, place and stead of the plaintiff, to sign, draw and deliver checks and other orders for the payment of money in connection with any account of funds on deposit which the plaintiff might then or thereafter have with the Guaranty Trust Company of New York, which said power of attorney was forthwith deposited at the office of said Guaranty Trust Company in said City of New York.

IX. That said C. H. Cahan, Jr., had no power or authority, under any of the said recited powers of attorney, to make, sign or draw checks of the plaintiff for the purpose of transferring and appropriat- 24 ing to himself or for his own personal and private use and benefit the funds of the plaintiff.

X. That the plaintiff personally has never had any account or any transactions with the defendant and has never given any orders, directions or instructions to the defendant with respect to any of the transactions hereinafter mentioned.

XI. That the said C. H. Cahan, Jr., at the several times hereinafter mentioned, wrongfully, fraudulently, without consideration therefor, and in breach of his trust as such attorney, from time to time drew twenty-one checks, amounting in all to $31,170.00, which said twenty-one checks, each and all of them, were signed in the name of the plaintiff by said C. H. Cahan, Jr., purporting to act as attorney of the plaintiff, upon the said Agents of the Bank of Montreal, or upon said Guaranty Trust Company of New York, and were payable out of funds, the property of the plaintiff, which were then deposited to the credit of the plaintiff in the plaintiff's personal account with said Agents of the Bank of Montreal, or with said Guaranty Trust Company of New York, as follows:

(1) Check, No. 371, dated July 12, 1916, for the sum of $1,000 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(2) Check, No. 387, dated August 1, 1916, for the sum of $5,000 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(3) Check, No. 415, dated September 1, 1916, for the sum of $2,000 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(4) Check, No. 435, dated September 20, 1916, for the sum of $3,500 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of the defendant.

(5) Check, No. 449, dated September 30, 1916, for the sum of $1,000 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of the defendant.

(6) Check, No. 456, dated October 13, 1916, for the sum of $670.00, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(7) Check, No. 473, dated November 1, 1916, for the sum of $1,000, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(8) Check, No. 495, dated November 17, 1916, for the sum of $1,000 drawn upon the Agents of the Bank of Montreal in the City of New York, payable to the order of said C. H. Cahan, Jr.

(9) Check, No. 514, dated November 29, 1916, for the sum of $1,000 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(10) Check, No. 569, dated January 2, 1917, for the sum of $1,000 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(11) Check, dated January 3, 1917, for the sum of $3,000 drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of the defendant.

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(12) Check, dated January 13, 1917, for the sum of $4,000 drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(13) Check, No. 34, dated March 22, 1917, for the sum of $500.00 drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(14) Check, dated April 12, 1917, for the sum of $500.00 drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

32

(15) Check, dated May 26, 1917, for the sum of $750.00 drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(16) Check, dated May 29, 1917, for the sum of $500.00 drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of C. H. Cahan, Jr.

(17) Check, dated July 27, 1917, for the sum of $500.00 drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

33

(18) Check, No. 39, dated August 20, 1917, for the sum of $1,000 drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(19) Check, No. 123, dated August 31, 1917, for the sum of $500.00 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(20) Check, No. 121, dated September 1, 1917, for the sum of $350.00 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

(21) Check, dated October 15, 1918, for the sum of $2,400 drawn upon the Guaranty Trust
35 Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr., or the defendant.

XII. That after drawing the said checks as aforesaid, said C. H. Cahan, Jr., wrongfully, fraudulently and in breach of his said trust, and without the authority or knowledge of the plaintiff, endorsed in his own name eighteen of the said checks, which were drawn payable to his own order; and without the authority or knowledge of the plaintiff, said C. H. Cahan, Jr., wrongfully, fraudulently and in breach of his said trust, delivered to the defendant at its said office, in the City of New York, at or
36 about their respective dates, each and all of said twenty-one checks, including three of said checks which were drawn payable to the order of the defendant.

XIII. That the defendant, at the request of said C. H. Cahan, Jr., and without the authority or knowledge of the plaintiff, wrongfully placed each of the said twenty-one checks to the credit of the personal and private account of said C. H. Ca-

han, Jr., at the said office of the defendant, and permitted said C. H. Cahan, Jr., to appropriate or to withdraw the proceeds of each of the said twenty-one checks, for his own personal use and benefit, and that the proceeds of all or a part of the proceeds of the check hereinbefore described for $1000, dated July 12, 1916, and of the proceeds of numerous of the other checks so appropriated were used by said C. H. Cahan, Jr., and accepted by the defendant in payment of indebtedness owing from said C. H. Cahan, Jr., to the defendant.

XIV. That the defendant collected each of the said checks from said Agents of the Bank of Montreal or from the Guaranty Trust Company of New York, accordingly as said checks were drawn upon one or the other of said banks; and said banks paid said checks to the defendant out of funds of the plaintiff then deposited at said banks and debited the amounts of the said checks in the plaintiff's accounts with said banks. 38

XV. That at all the times when said checks and each of them were deposited with the defendant and placed to the credit of the personal and private account of said C. H. Cahan, Jr., as aforesaid, the defendant had full notice of said wrongful and fraudulent acts of said C. H. Cahan, Jr.; and the defendant knew that the said checks and the funds upon which each of them was drawn were the property of the plaintiff; that said C. H. Cahan, Jr., had no authority to transfer or appropriate said checks or any of them or any of the proceeds thereof for his own personal use and benefit; and that said C. H. Cahan, Jr., in depositing said checks to the credit of his personal and private account with the defendant and in appropriating or withdrawing the proceeds thereof for his own personal use and benefit as afore- 39

40 *Complaint.*

said was thereby wrongfully and fraudulently and in breach of his said trust misappropriating and converting the plaintiff's property to his own use.

XVI. That the defendant, in receiving said checks for deposit as aforesaid, in collecting and receiving the proceeds thereof, and in permitting said C. H. Cahan, Jr., to appropriate or to withdraw such proceeds for his own use and benefit, as aforesaid, thereby knowingly participated with said C. H. Cahan, Jr., in his wrongful and fraudulent misappropriation and conversion of the plaintiff's property as aforesaid, and in his breach of his said trust.

41 XVI. That the plaintiff had no notice or knowledge of the wrongful and fraudulent transactions above described until early in February, 1920; and on February 19, 1920, so soon as the plaintiff had ascertained the actual facts, he gave notice thereof in writing to the defendant.

XVII. That the plaintiff has demanded of the defendant that it repay to the plaintiff the sums so converted and misappropriated as aforesaid, but that the defendant has failed and refused to repay said sums or any part thereof.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of $31,170, with
42 interest upon the amount of each of said checks from the date of its deposit with the defendant, together with the costs and disbursements of this action.

HUGHES, ROUNDS, SCHURMAN & DWIGHT,
Attorneys for Plaintiff,
Office & P. O. Address:
100 Broadway,
Borough of Manhattan,
New York City.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

AUGUSTUS L. RICHARDS, being duly sworn, deposes and says: That he is a member of the firm of Hughes, Rounds, Schurman & Dwight, attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true; that the sources of his information and the grounds of his belief as to the matters therein stated to be alleged upon information and belief are statements made to him by the plaintiff, communications from the defendant and an examination of certain of the checks referred to in said complaint and of certain records relating to the withdrawals of the moneys described therein; that the reason why this verification is made by deponent and not by plaintiff is that plaintiff resides and is outside the State of New York.

AUGUSTUS L. RICHARDS.

Sworn to before me this
27th day of July, 1920.

GEO. M. BILLINGS,
Notary Public,
(Seal) Kings County, No. 69.
Certificate filed Kings Co.; Register's Office No. 2051.
Certificate filed New York County No. 60.
Certificate filed N. Y. Register No. 2021.
Commission expires March 30th, 1922.

46 **Answer.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
Defendant.

47 The defendant, Empire Trust Company, appearing herein by Parmly & Stetson, its attorneys for its answer to the complaint of the plaintiff, respectfully shows unto this Court as follows:

FIRST: This defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations in said complaint contained in the paragraphs therein designated "I, III, IV, V, VI, VII, VIII, IX and X."

SECOND: This defendant admits the allegations of said complaint contained in the paragraph thereof designated "II."

48 THIRD: This defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations in said complaint contained in the paragraph thereof designated "XI," except that this defendant admits that the twenty-one (21) checks enumerated therein were drawn in substantially the words and figures set forth in paragraph XI of the complaint and purported to be signed in the name of the plaintiff by said C. H.

Cahan, Jr., as attorney of the plaintiff and for greater certainty defendant begs leave to refer to the originals of said checks which it prays may be produced upon the trial of this action.

FOURTH: This defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations in said complaint contained in the paragraph thereof designated "XII," except that this defendant admits that said twenty-one (21) checks were delivered to defendant.

FIFTH: This defendant denies, on information and belief, the allegations in the said complaint contained in the paragraph thereof designated "XIII," except that defendant admits that after collection, the proceeds of each of said twenty-one (21) checks were placed to the credit of the personal account of said C. H. Cahan, Jr., with the defendant and said proceeds were thereafter withdrawn by said C. H. Cahan, Jr., but this defendant denies that the proceeds or a part of the proceeds of all or any of said twenty-one (21) checks was accepted by the defendant in payment of indebtedness owing from said C. H. Cahan, Jr., to this defendant and this defendant alleges that during all the times mentioned in the complaint the said C. H. Cahan, Jr., was not indebted to this defendant in any sum whatsoever.

SIXTH: This defendant denies, on information and belief, the allegations in said complaint contained in the paragraph thereof designated "XIV," except that defendant admits that defendant collected each of said twenty-one (21) checks from said Agents of the Bank of Montreal or from the Guaranty Trust Company of New York.

52 *Answer.*

SEVENTH: This defendant denies all the allegations in said complaint contained in the paragraphs thereof designated "XV" and "XVI."

EIGHTH: This defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations in said complaint contained in the second paragraph thereof designated "XVI," except that this defendant admits that the plaintiff gave notice in writing of the said transactions to the defendant about February, 1920.

NINTH: This defendant admits the allegations in said complaint contained in the paragraph there-
53 of designated "XVII," that the plaintiff has demanded of the defendant that it repay to the plaintiff the sums representing the proceeds of said twenty-one (21) checks and that the defendant has failed and refused to repay said sums or any part thereof, but this defendant denies each and every other allegation contained in said paragraph "XVII."

TENTH: This defendant denies each and every allegation contained in the complaint not hereinbefore expressly admitted or denied.

FOR A FIRST SEPARATE AND DISTINCT DEFENSE.

54 ELEVENTH: This defendant alleges, on information and belief, that prior to the delivery of said twenty-one (21) checks to this defendant, all of these checks with the exception of check #19, as numbered in the said complaint, were "certified" or "accepted" by either the Guaranty Trust Company of New York, or the Agents of the Bank of Montreal, according as said checks were drawn upon one or the other of said banks. That upon delivery of said twenty-one (21) checks to this defendant,

all of said checks with the exception of said check #19 were marked "certified" or "accepted" by the bank upon which each check was drawn. That the plaintiff herein was not during the period covered by the transactions in question a depositor with the defendant and that this defendant had no means of knowing the nature and extent of the authority of the said C. H. Cahan, Jr., as agent of the plaintiff, but that this defendant did know that the Guaranty Trust Company of New York was the depositary bank of the said plaintiff, and that the authority or power of attorney of the said C. H. Cahan, Jr., to act on behalf of the plaintiff was lodged with the Guaranty Trust Company. That in view of the certification of said checks by the Guaranty Trust Company, this defendant relied on said certification as a guarantee of the signature of the maker of said checks by his agent and of the right of the payee of said checks to the funds. That in view of said certification of said checks, this defendant was under no duty to make inquiry as to the signature of the maker of said checks or of the right of the payee to the funds called for thereby. That the same is true of the checks drawn upon and certified or accepted by the Agents of the Bank of Montreal. That this defendant has not been negligent but that the loss to the plaintiff has arisen from the negligence of the said Guaranty Trust Company of New York and of the Agents of the Bank of Montreal and from the negligence of the plaintiff as hereinafter set forth.

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FOR A SEVOND SEPARATE AND DISTINCT DEFENSE.

TWELFTH: This defendant alleges on information and belief, that at all times mentioned in the complaint herein, the plaintiff kept a bank or pass

book in which all sums deposited by him or by his agent and said C. H. Cahan, Jr., were entered by the said Agents of the Bank of Montreal or the said Guaranty Trust Company of New York, at the time said deposits were made and credited to the account of the plaintiff, and that said bank or pass book of the plaintiff was balanced at the end of each of the calendar months during the period from July 1st, 1916, to November 1st, 1918, by charging to the account of the plaintiff the checks drawn against said account during the preceding month and entering in the said book or account the balance to the credit of the plaintiff, and all checks drawn upon the said account of the plaintiff during each of the months included in said period, were at the end of each of said months returned by the said Guaranty Trust Company of New York or the said Agents of the Bank of Montreal to the plaintiff as vouchers for the payment thereof and were received and retained by the plaintiff without objection.

THIRTEENTH: That all of the said twenty-one (21) checks enumerated in the paragraph of the complaint designated "XI," were so returned to the plaintiff and were received and retained by the plaintiff without objection. That no objection was made by the plaintiff to the said account so rendered by the said Guaranty Trust Company of New York and the said Agents of the Bank of Montreal to the plaintiff on the 1st day of each month included in said period from July 1st, 1916, to November 1st, 1918, or to the checks returned therewith as vouchers as aforesaid and no error was pointed out therein and no larger amount was claimed to be due to the plaintiffs from the said Guaranty Trust Company of New York or the said Agents of the Bank of Montreal than appeared by

said bank of pass book of account until on or about February, 1920. 61

FOURTEENTH: Upon information and belief that the plaintiff at all times aforesaid had notice or knowledge either actual or constructive, of all and singular said accounts so rendered by the said Guaranty Trust Company of New York or the said Agents of the Bank of Montreal to the plaintiff, and of all and singular, the deposits and payments aforesaid at the times that they were respectively made or within a reasonable time thereafter, and of the fact that said C. H. Cahan, Jr., was withdrawing the several sums of money hereinbefore referred to 62
upon checks signed by him as agent of the plaintiff and payable to his own order or to the order of this defendant. That an examination by the plaintiff of the account and acts of the said C. H. Cahan, Jr., and an examination by the plaintiff of said accounts, checks, pass books and balances would at all times have disclosed to the plaintiff all and singular, the acts and matters set forth in the complaint. That the plaintiff negligently and carelessly conducted his business affairs and negligently supervised the aforesaid acts, matters and transactions and negligently failed and omitted to point out or call to the attention of the said Guaranty Trust Company of New York or the said Agents of 63
the Bank of Montreal or the defendant the alleged want of authority of the said C. H. Cahan, Jr., as agent as stated in the complaint and the alleged errors in honoring and paying drafts drawn upon said account as stated in the complaint, that the defendant was deprived of any and all opportunity to correct said alleged errors, if any, and of all opportunity to prevent the collection of further sums and drafts in and upon said account and

was deprived of all its rights, remedies and cause or causes of action to recover from said C. H. Cahan, Jr., and others any property or sums in the premises.

FIFTEENTH: Upon information and belief, that within a short time prior to the appointment of C. H. Cahan, Jr., as the agent and attorney of the plaintiff, as alleged in the complaint herein, said C. H. Cahan, Jr., had, to the knowledge of the plaintiff, been guilty of various acts of misappropriation of moneys entrusted to him, and was known to the plaintiff to be unreliable and untrustworthy; and
65 that plaintiff negligently appointed said C. H. Cahan, Jr., his agent and attorney, as alleged in the complaint, and that any loss the plaintiff may have sustained in regard to the matters and transactions alleged in the complaint, was caused by the aforesaid negligence of the plaintiff, and not by any act or ommission of the defendant.

SIXTEENTH: That the defendant was thereby damaged in the sum of Thirty-one thousand one hundred and seventy and 00/100 ($31,170.00) Dollars with interest; that the defendant was not guilty of any act, neglect or omission contributing in whole or in part thereto.

66 FOR A THIRD SEPARATE AND PARTIAL DEFENSE

SEVENTEENTH: This defendant reiterates and realleges all the allegations contained in paragraphs Twelfth, Thirteenth, Fourteenth and Fifteenth of this answer with the same force and effect as if herein set forth at length. By reason thereof, defendant has been damaged in the sum of Thirty-one thousand one hundred and seventy ($31,170.00) Dollars with interest, or some part thereof; that de-

fendant was not guilty of any act, neglect or omission contributing in whole or in part thereto.

FOR A FOURTH SEPARATE AND DISTINCT DEFENSE.

EIGHTEENTH: The defendant alleges, on information and belief, that at the time the said 21 checks referred to in the complaint were collected by the defendant from the said Guaranty Trust Company of New York and the said agents of the Bank of Montreal, plaintiff had no legal title to any money in either of said banks; that under the agreement between plaintiff and said banks, the title and ownership of all moneys deposited in said banks 68
became immediately upon their deposit vested in said banks, and that plaintiff had merely a credit with said banks to the amount of said deposits.

NINETEENTH: That if, as alleged in paragraph IX of the complaint, the said powers of attorney lodged with the said Guaranty Trust Company of New York and the said agents of the Bank of Montreal, as alleged in the complaint, did not authorize the said C. H. Cahan, Jr., to draw the said checks referred to in the complaint, such fact was known to the said Guaranty Trust Company of New York, and the said agents of the Bank of Montreal, with whom the said powers of attorney were lodged; and the payment of said checks by said banks was 69
wrongful and improper, and the amounts of said payments could not be charged against plaintiff's credit with the said banks.

TWENTIETH: That the money paid by the said banks to the defendant upon its presenting the said checks for collection from the said banks, was not the property of the plaintiff, but was the property of the said banks, and that any rights that may

exist to recover said money belong to the said banks and not to the plaintiff.

FOR A FIFTH SEPARATE AND DISTINCT DEFENSE

TWENTY-FIRST: This defendant alleges, on information and belief, that there is another action pending in the Supreme Court of the State of New York in and for the County of New York in which the said C. H. Cahan is plaintiff and the said Guaranty Trust Company of New York is defendant, and that in said action, the said plaintiff seeks to recover from the said defendant the sum of Ten thousand
71 one hundred and fifty ($10,150) Dollars representing the proceeds of checks numbers 12, 13, 14, 15, 16, 17, 18 and 21 as enumerated in the paragraph of the complaint herein designated XI. That in the event that the plaintiff C. H. Cahan recovers a judgment in said action against the defendant therein the said Guaranty Trust Company of New York, the said C. H. Cahan as plaintiff herein will not be entitled to recover a judgment against this defendant in respect to the said eight checks enumerated above and that the trial of this action should be postponed until the said action pending in the said Supreme Court shall have been tried and concluded.

WHEREFORE, this defendant demands judgment
72 dismissing the complaint together with the costs and disbursements of this action.

PARMLY & STETSON,
Attorneys for Defendant,
Empire Trust Company,
42 Rector Street,
Borough of Manhattan,
New York City

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

FRANCIS HENDERSON, being duly sworn, deposes and says; that he is the Vice President of the Empire Trust Company, the defendant herein, and that the principal office of said company is at No. 120 Broadway, in the Borough of Manhattan, City of New York; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief and that as to those matters he believes 74
it to be true; that the reason why this verification is made by deponent and not by defendant is that defendant is a domestic corporation and deponent is the Vice President thereof and that he has derived his knowledge of the facts above set forth from information acquired by him in the performance of his duties as Vice President of said company.

FRANCIS HENDERSON.

Sworn to before me this
20th day of November, 1920.

JAMES HYSLOP FARRELL,
Notary Public, 75
(Seal) Kings County.
Kings Co. Register's No. 1106.
Kings County Clerk's No. 219.
Certificate filed in New York Co.
Clerk's No. 347; Register's No. 1362.
Commission expires March 30, 1921.

76 **Judgment.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN, Plaintiff, against EMPIRE TRUST COMPANY, Defendant.	Dated: January 12, 1925. L 22-266, 1920.

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The issues in this action having been duly brought on for trial on the 19th day of December, 1923, before Honorable Francis A. Winslow, District Judge, duly assigned and sitting in the United States District Court for the Southern District of New York, and a jury of one juror duly impaneled and sworn in accord with the consents of attorneys for both the plaintiff and the defendant to try the case by a jury of one juror; and the allegations and proofs of the plaintiff and of the defendant having been considered on that day and on the 20th day of December, 1923; and the plaintiff having moved at the close of all the evidence for the direction of a verdict for the plaintiff; and the defendant having likewise moved for the direction of a verdict for the defendant; and the Court having thereupon reserved its decision, and having thereafter on the 22nd day of December, 1924, at an adjourned session of the original trial and in open court directed a verdict for the plaintiff for Thirty one Thousand One Hundred Seventy Dollars ($31,170.00), being the aggregate amount of the checks involved in this action but without interest on the amount of said checks

or any of them, and by such direction of the Court a verdict having been rendered for the plaintiff for Thirty-one Thousand One Hundred Seventy Dollars ($31,170.00) and the defendant having taken an exception to the direction of such verdict and to the verdict as directed, and the plaintiff having taken an exception to the direction of the Court in so far as it failed to direct the inclusion in the verdict of interest on the amounts of the checks as demanded in the complaint and to the verdict in so far as it failed to include such interest,

Now, on motion of Rounds, Schurman & Dwight, attorneys for the plaintiff, it is 80

ADJUDGED, that the plaintiff, Charles Hazlitt Cahan, recover from the defendant, Empire Trust Company, the sum of Thirty-one thousand one hundred seventy dollars ($31,170.00), being the amount of said verdict, and that the said plaintiff also recover from the said defendant, interest at six per centum (6%) per annum on the said sum from the 22nd day of December, 1924, to the present date, being One Hundred Nine and 9/100 Dollars ($109.09), and that the said plaintiff recover from the said defendant the further sum of Thirty-five Dollars five cents ($35.05), taxable costs and disbursements in this action; amounting in all to the 81 sum of Thirty-one thousand three hundred fourteen Dollars fourteen cents ($31,314.14), and that the plaintiff have execution accordingly.

Judgment signed and entered this 12th day of January, 1925.

ALEX. GILCHRIST, JR.,
Clerk.

82 **Bills of Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

vs.

EMPIRE TRUST COMPANY,
Defendant.

Before:
Hon. FRANCIS A. WINSLOW, J., and a Jury of One.

New York, December 19, 1923.

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APPEARANCES:

ROUNDS, SCHURMAN & DWIGHT, Attorneys for Plaintiff; CHARLES E. HUGHES, JR., THOMAS L. ENNIS, of Counsel.

PARMLY, STETSON & WOODWARD, Attorneys for Defendant; VAN VECHTEN VEEDER, WILLIAM P. ALLEN, WILLIAM L. WOODWARD, of Counsel.

(By mutual consent of counsel for the respective parties in open court, the case is tried before a jury of one.)

(Whereupon, a jury of one was impaneled and duly sworn.)

84

Mr. Veeder: If your Honor please, I desire to withdraw all the separate defenses, five in number, as stated in the answer.

The Court: What page are they on?

Mr. Veeder: Folios 9 to 27, numbered paragraphs eleventh to twenty-first, both inclusive.

The Court: This copy of the pleadings does not seem to be foliosed, so if you will give me the paragraphs?

Mr. Veeder: Beginning with the eleventh, numbered paragraph 11. Is that folioed in your copy?

The Court: No. That is on the third page?

Mr. Veeder: Yes; the eleventh to the twenty-first; that is, right down through the rest of them to the end, inclusive. So I amend the answer by striking out the five defenses numbered paragraphs eleventh to twenty-first, folios 9 to 27, both inclusive.

We have entered into a written stipulation to try the case before a jury of one, and that each side, at the conclusion of the evidence will move for a directed verdict. I now file the written stipulation to that effect, with the clerk. 86

STIPULATION.

IT IS STIPULATED by the parties hereto that this case shall be tried by a jury of one and that at the conclusion of the evidence each party shall move for a directed verdict.

ROUNDS, SCHURMAN & DWIGHT,
Attorneys for Plaintiff.

PARMLY & STETSON,
Attorneys for Defendant.

Mr. Hughes: I assume, if your Honor takes the cross-motions for a directed verdict at the conclusion of the case, your Honor will set a date for briefs and argument on those motions 87

The Court: Yes. I assume there is a very nice question involved, and I shall probably want briefs and argument.

Mr. Hughes: We assumed so, and that being the case, we felt that it would be better to prepare our brief after the testimony was in, and we could see exactly how the case shaped up.

88 *Bills of Exceptions.*
Charles Hazlitt Cahan—Plaintiff—Direct.

The Court: Very well.

Mr. Hughes: Does your Honor care to have an outline of the case before I put Mr. Cahan on the stand?

The Court: Yes. I have gone through the pleadings only very superficially, and shall be very glad to have some additional light in the way of a statement by counsel.

(Whereupon, Mr. Hughes made an opening statement to the Court, followed by Mr. Veeder.)

The Court: I think I now have a fair idea of the
89 issues, and you may proceed.

CHARLES HAZLITT CAHAN, the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Hughes.

Q. Mr. Cahan, where do you reside? A. At the City of Montreal, Quebec, Canada.

Q. And you are a citizen of what nation? A. I am of British citizenship.

Mr. Hughes: I assume, if your Honor please, that Mr. Cahan's testimony is compe-
90 tent as to his citizenship. He has passports at the hotel, if you wish to see them.

The Court: I assume so, unless objection is made.

Q. You are a citizen of Great Britain? A. Yes.

Q. And a resident of Montreal? A. We say we are citizens of the British Empire.

Mr. Hughes: I accept the correction.

The Witness: With residence in Canda.

Q. Yes. In 1915, 1916 and 1917, did you have occasion to make your headquarters in New York? A. Yes, for special services in connection with the war.

Q. Will you describe as fully as you may think necessary, the circumstances under which you were in New York during that period? A. I am a Barrister and Kings Counsel. I was one of the attorneys, for some years, for the War Department and the Admiralty, my duties being confined to this particular coast, with headquarters at Halifax. After the war broke out I went from Montreal to London in connection with some matters there of a legal nature, affecting Canadian securities, and while 92
there, representatives of the British Government asked me if I would not be willing to go back and attend to some war services for them. It was pointed out to me that the British Government was guaranteeing the payment in America of very extensive munitions which were being or about to be manufactured in America for the Russian Government; and contracts to the extent of about $90,000,000 were given to the Canadian Car & Foundry Company, Limited, and I was asked to go ostensibly as counsel for the Canadian Car & Foundry Company, Limited, but really to look after the interests of the British Government, which was guaranteeing payment. That was how the matter arose. And early 93
in January, 1915—rather, the last of January, 1915, I came from London here to New York for that purpose. In the autumn of 1915, the Canadian Car & Foundry Company had become heavily involved—involved to the extent of $30,000,000 or $40,000,000—and was unable to find the credit, and was about to go or was being pressed into insolvency. I put up to the British Government again that this would bring down a large number of factories in the

United States, and America was not then in the war, and I thought it would make a very bad impression; so under their instructions—the British Government—we formed a company—a New York company, called an agency for the Canadian Car & Foundry Company, so as to avoid too much suspicion, but which was really a trust in which the British and Russian Governments appointed me chairman of the board of directors, the directors being named by the two governments, to take over all these contracts to the extent of about $90,000,000, the British Government furnishing money to carry it out, and we carried out those contracts until 1917,
95 when in April of that year, 1917, the American Government having declared war, or having come into the war by declaration, we began closing up that work and the factories—a number of them—I think, the principal ones which had been engaged throughout the United States in the manufacture of munitions for the Russian Government, and they were taken over on contracts for services in connection with the American Government. We closed up fairly well here about August, 1917, and I went back to Montreal, being called here from time to time as various settlements came up, and subsequently called to Washington, where I gave some assistance there in connection with the American Government.
96 Then I had, early in 1918, some deaths in my family, which broke me pretty well, and I was ill. I then went, for the British Government again, and partly for the Bank of Montreal, to San Francisco; I had a dual mission to carry out—a mission for the Bank of Montreal, and also in connection with the Italian—not the Italian, but the Indian espionage, which sent me there and into British Columbia, and I came back from there in July, and I was appointed then Director of Public Safety for Canada—I think

it speaks for itself—in charge of espionage in that country and revolutionary movements in Canada, in connection with the foreign secret service of the United States, with which I was in communication, and the British secret service; and I remained there until, I think, February, 1918, and the Armistice having then been declared, and having settled the affairs of that department fairly well——

Q. (Interposing) In February, 1919, you mean? A. When was the Armistice?

Q. November, 1918. A. Yes, February, 1919, I should have said. Then I went with the British Government again, in settling and adjusting their 98
contracts in connection with a branch of the British War Office, in America. The contracts which I was arranging settlement of were large contracts for the supply of horses and mules and other equipment from America for that department.

Mr. Veeder (interposing): If Mr. Hughes will undertake to point out the materiality of all this, I shall not object.

Mr. Hughes: It is simply laying a foundation for the giving of these various powers of attorney, Judge Veeder.

The Court: Of course, gentlemen, in the absence of a jury of twelve, I assume that even though there might be some question of 99
relevancy, no particular harm is done, and it may give us a more clear picture of the facts that antedated the transactions that we have in issue here.

The Witness: Judge, I will restrict it. A lawyer, you know, is the worst witness in the world.

Mr. Veeder: I know.

The Court: It is very interesting too, I think, if Judge Veeder will not urge his objection.

Mr. Veeder: No.

The Court: Particularly from a member of our learned profession—I think we shall be very glad to hear the situation.

Mr. Hughes: Then, if you will proceed, please.

The Witness: Then, I was ill. I completed that work—this is 1919——

101 Q. Yes, we had reached 1919. A. I completed that work pretty well by July, and in the hot weather I was taken ill, and my wife took me away, and I came back late—I have forgotten when, but I was in very poor health.

Q. Now, Mr. Cahan, in view of your various absences, which you have briefly described, in this war work, did you find it advisable to give various powers of attorney in any connection? A. I did. I had an account for some years—a small account with the agency of the Bank of Montreal, in New York, and then I was using it simply to pay expenses when I was down in New York. They would give no interest on deposits——

102 The Court (interposing): You mean personal expenses?

The Witness: Yes, personal expenses.

The Court: Not expenses in connection with your official activities?

The Witness: No. I paid my personal expenses largely. Sometimes I received it back, but otherwise I would draw on my personal accounts for it; and I stayed here making my headquarters at the Manhattan Hotel, until October, 1915, I think. I think

it was in the month of October; and then I was there under the secret service—the secret service and espionage—and some of my papers were missing from there, and so I took a small apartment up on Broadway, where I lived, when I was in New York, until August, I think, 1917. Then I closed up the apartment, and when I came back I went to the Manhattan Hotel again. During that time I was in Europe, back and forth.

Q. Now, coming down to the powers of attorney—A. (Interposing) Oh, and I had also opened an account with the Guaranty Trust Company here, under these circumstances: that I had a certain amount of money coming in to me here; I think it came partly through the sale of some American bonds which I had, and the agents of the Bank of Montreal would not pay me any interest, so I went to a friend of mine, who was vice-president of the Guaranty Trust Company, and asked him if I could open an account with the Guaranty Trust Company, and I did. I opened an account there in which I paid in what I regarded as sort of a savings bank account, where I was receiving interest at the rate of three per cent.; so that I used to draw money from the agents of the Bank of Montreal, when it began to accumulate, and paid it over to the Guaranty Trust Company. 104 105

Q. That is, you had two bank accounts here in New York during that period? A. Yes.

Q. And only two? A. That was all. Well, of course, I was drawing, as chairman of the board—

Q. (Interposing) No; I mean your personal accounts. A. Yes, those were my personal accounts.

Q. You had only two personal bank accounts? A. Yes.

Q. One at the agents of the Bank of Montreal, which you used as a general checking account for the payment of your personal expenses? A. Yes.

Q. And the other at the Guaranty Trust Company, which you regarded, as you have testified, as more or less of a savings account? A. Yes.

Q. And in which you deposited from time to time large sums, mostly drawn from the agents of the Bank of Montreal, is that correct? A. Yes.

Q. Now, coming down to the powers of attorney concerned in this case, I understand you have testified generally that in view of your absences, you found it convenient to give certain powers of at-
107 torney? A. If I remember correctly— and I think I am perfectly sure, although I have not had an opportunity of discussing this with you for a long time, I gave a power of attorney in September, 1916, to my son, in connection with my account with the Guaranty Trust Company of New York.

Q. Is this document the original power (handing paper to witness)? A. Yes, this is the power dated September 21, 1916; that is my signature, and that was witnessed in the way it purports to be witnessed.

Mr. Hughes: I ask to have this marked for identification—this power of attorney.

108 (Paper marked Plaintiff's Exhibit No. 1 for Identification.)

The Witness: The battle of Courcelette took place about the 14th or 15th of that month, and I had three boys in it—the family—and I received about the 17th or 18th—I believe that I received a cable from one of the surgeons saying that one of my boys—that he would probably live if I could—until I could get there to see him. I could not find

out anything about the other two boys. Of course, I was very much upset, and I left on Saturday of that week to go to France, and I remember before going signing the power of attorney—I think that is it, but you can compare it with the other—that I signed a power of attorney to give my son power to draw on the Guaranty Trust.

Q. That was the first power you had given? A. Yes.

Q. To draw on the Guaranty Trust? A. Yes. I did not know whether I could get funds through the Bank of Montreal to the particular spots in France 110
that I might have to visit, and I made up my mind that I was going to bring the boys back, whether they were dead or alive, and so I wanted to have ample leeway in getting funds to France, if I needed funds there.

Q. That was the occasion of your executing this instrument giving C. H. Cahan, Jr., authority in connection with your account? A. Yes.

Q. With the Guaranty Trust Company? A. Yes.

Q. And do I correctly understand that there had, previous to this date, been no power of attorney in his hands to draw on the Guaranty Trust? A. No, there was no other power except that, on the Guaranty Trust Company. There was at that same 111
time outstanding a power of attorney which—I think it was for two months—it had been outstanding for about a month, with the agents of the Bank of Montreal.

Q. Coming to the period that is concerned in this action, was a power of attorney given by you to your son in connection with your account with the agents of the Bank of Montreal, on May 29, 1916 (handing paper to witness)? A. Yes, this is a copy compared

by me with the original. I see those are my figures at the top.

Mr. Hughes: Then I will ask that this be marked for identification, and will state that we have served on the agents of the Bank of Montreal a subpoena duces tecum to produce the original of this document, and that if that arrives, we will offer the original in evidence, and if it does not, we will submit that that lays the basis for the introduction of secondary evidence.

113 (Paper marked Plaintiff's Exhibit No. 2 for Identification.)

Q. This power of attorney, dated May 29, 1916, running for two months—that was the period, two months? A. Yes.

Q. And then on July 29th, at the expiration of those two months, was another power of attorney given to your son? A. Yes.

Q. And that is a copy, is it (handing paper to witness)? A. This power of attorney of May 29, 1916, if I remember correctly, was given when I was leaving New York to go to London, when I was called there in connection with some of this. I remember I was there in June, and I gave that power
114 because I had personal expense to pay, you know. I had my secretary here, and I had other personal expenses in New York, and I gave that power of attorney then. This power of attorney of July 29, 1916, comes practically at the end of that period. When that power of attorney came to an end, I was again just about leaving New York, and off and on I renewed it, as you see.

Q. Then, on October 30, 1916, did you give a further power of attorney with reference to your

115

account in the agency of the Bank of Montreal (handing paper to witness)? A. Yes. If Saturday was the 28th or 29th of October, I returned to New York from my trip to France, and I brought a boy—got a couple of girls from the casualty station there, and I brought him on a stretcher. You will excuse me; my nerves are badly broken. I got back on that date, with one of the boys, and my son came to me and told me the other power of attorney had expired, and wanted to know whether he should draw on the Guaranty Trust for the expenses—the hospital, etc., and I said, "No, I will give you another power of attorney, because I want you to draw it on the agents of the Bank of Mon- 116
treal," and I gave him this power of attorney, renewing it so that he could draw on the agents of the Bank of Montreal, and that power was given the day after I returned.

Q. And that power, I understand, is unlimited in time? A. Yes.

Mr. Hughes: I ask to have the power of attorney with reference to the agents of the Bank of Montreal on July 29, 1916, marked Plaintiff's Exhibit No. 3 for Identification, and the copy of the October 30th power of attorney, Plaintiff's Exhibit No. 4 for Identification. As to all of these, the originals 117
have been subpoenaed, and either they or copies will be offered in evidence, as the case may be.

(Papers marked respectively Plaintiff's Exhibits Nos. 3 and 4 for Identification.)

Q. Mr. Cahan, were there, during the times covered by the powers of attorney as you have just testified, any other powers of attorney outstanding

in favor of C. H. Cahan, Jr., with respect either to the account in the agency of the Bank of Montreal or the account in the Guaranty Trust Company? A. No, nor any other accounts at all. There was no other power upon any other bank or banking accounts. Those were all.

Q. So that these documents, copies of which have been marked for identification, constituted the sole authority of C. H. Cahan, Jr., with respect to these bank accounts, did they? A. Yes. He had no other powers for any other purposes whatsoever.

Q. Now, Mr. Cahan, at a later time did you dis-
119 cover that your son, C. H. Cahan, Jr., had used your bank accounts fraudulently? A. Yes. May I correct——

Q. (Interposing) Yes. A. (Continuing) After I was here in August, 1917, I went back to Montreal, and was taking up other work, and coming here occasionally, and to Washington cleaning up, and then doing some other work for the Canadian Government, and I gave him a power of attorney on my bank account with the Bank of Montreal at Montreal, but that was given in August, 1917, after I had taken up my nominal residence again in Montreal.

Q. And that had reference to the Bank of Montreal in Montreal? A. Yes.

120 Q. And not to the agency of the Bank of Montreal in this city? A. No.

Q. I see. A. Now, what was your question?

Q. The question I asked was whether at a later time, and, if so, when, you discovered that your son, C. H. Cahan, Jr., had fraudulently dealt with your bank accounts? A. On the morning of December 27, 1919, I found it out. I had received a note before—the night before——

Q. (Interposing) That is, the night of the 26th? A. The night of the 26th after I arrived home for

my dinner, from the manager of the Bank of Montreal at Montreal, asking to see me very especially.

Q. That was the manager of the Bank of Montreal in Montreal? A. Yes.

Q. And not the New York agency? A. No, he was the manager of the Montreal City branch of the Bank of Montreal.

Q. And you were then in Montreal? A. Yes.

Q. And your son was in Montreal? A. Yes.

Q. Just describe the circumstances under which you made this discovery. A. That bank had always called me in as counsel in very important matters, and I received this note about dinner time, saying he wanted to see me very especially, and I thought it was in connection with some banking business, that someone was in trouble; and after dinner I rang up my son, got him on the phone, and I said, "The Bank of Montreal is asking me to see them very especially; do you know what it is?" Oh, I called up the manager, and the manager was out of his house, and my son replied, "Yes." He said he knew what it was; that he would be right over and see me, and I waited, and he did not come, and I went over to his room, and he had just gone out, they said, and I thought he must have passed me on the street, so I went back, and he did not come, and then I thought that he had probably gone to take it up—you see, to look into it, knowing what it was; and I made no further alarm that night. The next morning I went into the bank, and the bank manager said to me—he said, "Mr. Cahan, your account is overdrawn $24,000." I thought I had about $70,000 or $75,000 to my credit.

Q. Was this your personal account? A. Yes, this was my personal account; and then he began to show me some material, and I saw that things were wrong, and I learned then for the first time that

he had an account with the Home Bank of Canada—that my son had a personal account with the Home Bank of Canada, and they told me that there was something wrong with the Corporation Agency's account.

Q. That was a corporation in which you were a large stockholder? A. I was a stockholder and president of that.

Q. And your son, C. H. Cahan, Jr., was a director? A. Yes, I put him on as a director, owing to my being away so much. I went to the Merchants Bank of Canada and found out things were wrong
125 there, and then I went to see the manager of the Home Bank, and then I found out what was wrong. I immediately took every step possible to find him, but could not find him, and I subsequently found he had disappeared that night before 12 o'clock, because at my offices is a register at night, and I found by this register that he must have left the hotel soon after I telephoned him, and he went to the offices and opened them up and took away some things from there, and I have never found out since where he is. I have heard rumors——

Q. (Interposing) You have never seen him since that time? A. No, I have never seen him since that time.

Q. And you do not know where he is now? A.
126 I have no idea.

Q. Now, Mr. Cahan, I understand that you discovered at that time—I am speaking only generally now—that he had fraudulently diverted funds of yours on deposit both with the Bank of Montreal in Montreal and the agents of the Bank of Montreal here in New York, and the Guaranty Trust Company of New York, and applied those funds to his own uses? A. When I found that everything was gone, as I told you——

Mr. Veeder (interposing): Of course, I cannot tell how the answer will be, but certainly the question calls for a mere conclusion. Will you repeat the question?

The Court: I think it does.

Mr. Hughes: Yes, I think it does. If there is objection, I will concede that the question should be reframed.

Q. I will state it this way: did you then discover that with respect to all three bank accounts—your account in the Bank of Montreal at Montreal, your account with the agency of the Bank of Montreal here in New York, and your account with the Guaranty Trust Company—there were withdrawals that were connected with no purpose of your own? 128

Mr. Veeder: I object to that, your Honor. I have no objection to his stating what he discovered, but let him state it himself.

Mr. Hughes: The objection is that it is leading?

Mr. Veeder: Yes.

The Court: Just state generally what you discovered regarding these accounts.

The Witness: Before noon that day I wired the Guaranty Trust Company to know how my account stood there. I have the telegrams; and the reply came back that it was, if I remember correctly, something about $20 to my credit; and I wired to the agents of the Bank of Montreal at New York, to see what was to my credit there, and the reply came back that it was some small amount. I have the telegrams there. It was something about $300. And I found out from them subsequently by correspondence— 129

those amounts were confirmed, that all that remained to my credit was about $20 in the Guaranty Trust Company, and about $300 at the agents of the Bank of Montreal. I then had to break into my own safe, and I found out also that securities as well as cash of the Corporation Agency's, Ltd., was gone.

Q. Do I correctly understand that if things had been as they should have been, the balances to your credit with the agency of the Bank of Montreal and the Guaranty Trust Company and the Bank of Montreal in Montreal would have been very much
131 larger? A. Of course——

Mr. Veeder (interposing): I must object to that, your Honor.

The Court: Yes. I believe that the burden is upon you to show that these checks were drawn and that the funds were diverted.

Mr. Hughes: Of course I am coming to these particular checks right away, your Honor. This is simply a general preliminary question. I did not intend that it should be a conclusion as to all of the facts in this action, but I will withdraw it, and bring it right down to the checks in issue in this case.

The Court: Yes.

132

Q. I will ask you first, generally, Mr. Cahan, had you any knowledge at the times of which we have been speaking, that your son, C. H. Cahan, Jr., had an account in the Empire Trust Company? A. No, I never knew it until after—about the middle of January I discovered a private box——

Mr. Veeder (interposing): What year, Mr. Cahan?

The Witness: That is, about January, 1920; that is, after he had left. There was some controversy in that other suit about the date, but it was about the middle of January, I think, at least, or perhaps later, I discovered in an iron box which he had put in the vaults of the Ritz-Carlton Hotel in Montreal—they called my attention to it; they knew of his disappearance, and we opened it in the presence of the manager, and then I found a lot of these checks, which I—may I describe them as fraudulent checks, generally?

Mr. Veeder: Canceled checks? 134

The Witness: Fraudulent checks.

Mr. Veeder: I object to that.

The Court: Yes; I suppose the word "fraudulent" is objectionable.

Mr. Veeder: Yes.

The Court: Just describe them as canceled checks.

Mr. Veeder: May I suggest that you refer to them as canceled checks drawn on those banks here in New York by your son?

The Witness: Yes, and I found a number of checks purporting to have been drawn on my account at the Guaranty Trust Company in New York, and at the agents of the Bank 135
of Montreal in New York, of which I had never known before that date, and which conveyed to me the suggestion—which bore on their face that they were deposited through the Empire Trust Company.

Mr. Veeder: I object.

The Court: Yes. You discovered these checks drawn on these two banks of which

you had theretofore had no knowledge—the canceled checks?

The Witness: Yes.

The Court: Now, can we have them identified?

Mr. Hughes: Yes.

The Court: How many are there?

Mr. Hughes: There are twenty.

The Court: Just say, "I hand you twenty checks and ask you to identify those as the checks to which you have referred."

Mr. Hughes: Well, there are other checks. These are the ones concerned in this particu-
137 lar suit. His answer was a general answer.

The Court: I think if you will get right down to the issue and show him the specific checks——

Mr. Hughes (interposing): Yes, I will do that.

Q. Mr. Cahan, I show you twenty checks and ask you whether those are amongst the checks which you discovered, and of which you had not previously known, according to your testimony just given (handing papers to witness)? A. Yes, those checks were among the checks that I discovered in that box at the Ritz-Carlton Hotel in Montreal, and I
138 had never known of any or either of these checks before, and the signature, C. H. Cahan, Jr., signing as my attorney in drawing these checks in my name, is the signature of my son, C. H. Cahan, Jr.

Mr. Hughes: I ask that the portion of the answer "signing as my attorney" be stricken out.

Q. And instead I ask you whether that part of the signature to these checks which is written in

ink, "C. H. Cahan, Jr.," is the handwriting of C. H. Cahan, Jr., and whether the ink signature on the back of some of those checks, "C. H. Cahan, Jr.," is in the handwriting of C. H. Cahan, Jr., your son (handing papers to witness)? A. The signature in the drawing of the check is in the handwriting of my son, C. H. Cahan, Jr. That is his signature in each case. On the back of the checks the signature, "C. H. Cahan, Jr.," so far as it appears, is in his handwriting, and is his signature in each case, with the exception of three checks. I do not think that any of those endorsements are C. H. Cahan, Jr.'s.

140 Q. The endorsements as to which you have just stated a doubt relate to the check numbered 435 of September 20, 1916, on the agents of the Bank of Montreal— A. (Interposing) For $3,500.

Q. Yes; check No. 449, dated September 30, 1916, on the agents of the Bank of Montreal for $1,000? A. Yes.

Q. And check No. 569, January 2, 1917, on the agents of the Bank of Montreal in the amount of $1,000? A. Yes. With respect to those three checks I do not think that the name "C. H. Cahan, Jr.," as it appears in the endorsement here, is his handwriting or his signature.

141 Mr. Hughes: I offer these checks in evidence, and ask that they be marked Plaintiff's Exhibits Nos. 5, 5-A, 5-B, 5-C, etc. There are twenty of them altogether.

(Twenty papers marked respectively Plaintiff's Exhibits Nos. 5 and 5-A to 5-S inclusive.)

Q. Mr. Cahan, except for the powers of attorney as to which you have given testimony, and which,

142 *Charles Hazlitt Cahan—Plaintiff—Direct.*

or copies of which, have been marked for identification, and without conceding or testifying one way or the other to the legal conclusion as to whether those powers of attorney gave any authority, that being a question of l. w, except for those powers of attorney, did you ever authorize or instruct your son, C. H. Cahan, Jr., to draw any of those checks which have just been marked in evidence? A. No.

Mr. Veeder: I have no objection. It would not be binding on us anyway. Go ahead.

Mr. Hughes: Before I come to that question, if it may be considered that the stenog-
143 rapher interpolates this before that last question and answer—the twenty-first check we have not got; it has not been found. As to that the complaint alleges—the complaint in paragraph eleven describes these checks—twenty-one of them in order. The checks that have been introduced in evidence correspond to the first twenty of them, and the complaint thus describes the twenty-first check: "Check dated October 15, 1918, for the sum of $2,400, drawn upon the Guaranty Trust Company of New York in the City of New York, payable to the order of C. H. Cahan, Jr., or the defendant," and the defendant's answer——

144 The Court (interposing). Admits the execution and drawing of that check?

Mr. Hughes: In paragraph third thereof.

Mr. Veeder: Yes, that is admitted.

The Court: A check drawn either one of two ways——

Mr. Veeder (interposing): We got the entry from the bank's books, and it shows that. As to how it was drawn, we do not know.

Mr. Hughes: And it is admitted in the answer that that check was drawn and charged against the account of the plaintiff with the Guaranty Trust Company.

Mr. Veeder: Yes.

Mr. Hughes: So that check may be regarded as also proved; and then the question that I just asked before that, and the answer to it.

By Mr. Hughes.

Q. Mr. Cahan, again without asking you, and disclaiming any intention in the form of my question to state any legal conclusion with respect to the construction of these powers of attorney, were any of these checks drawn for any purposes of yours? 146

Mr. Veeder: If he will answer that yes or no, I shall not object to it.

The Court: Counsel says that if you answer that yes or no he will not object to the question.

The Witness: No.

Q. And you have already testified, I believe, that you had no knowledge of the drawing of any of these checks until some time about January, 1920? A. I had no knowledge before January, 1920.

Q. You kept check books, I suppose, in connection with your accounts in the Guaranty Trust and the agency of the Bank of Montreal? A. Yes. 147

Q. Will you describe or will you state whether in those check books any stub appeared on which there was any—will you state whether in those check books there was any stub on which appeared any notation of the drawing of a check corresponding to any of the twenty-one checks which have just

been offered in evidence or described? A. There was not a single notation in the check book of any of these checks.

Mr. Veeder: Well, of course, the defendant can hardly be bound by any notation in a check book. How can we be bound by any notations that might be made in a check book?

Mr. Hughes: It is simply one item of evidence as showing fraud. That is, that the agent had not entered these checks in the check book.

149 The Court: I suppose it might show the intent on the part of the attorney-in-fact as a circumstance.

Mr. Hughes: Yes.

The Court: Are the check stubs available?

Mr. Hughes: They are here, if your Honor wants them.

The Witness: This may not be competent evidence, but some of the checks of these numbers are entered in some cases.

Q. That is, in some cases there will be a check numbered, we will say, for the sake of illustration, 435? A. No; check No. 435 does not appear in the check book at all, but if you will take check No. 150 415, that is a check dated September 1, 1916, for the sum of $2,000, and the check stub numbered 415 you will see from the stub book enters, "New York Telephone Company, $9.27."

Q. That is, in the stub book there appears a check numbered 415? A. Yes.

Q. To the order of the New York Telephone Company? A. Yes.

Q. For $9.27? A. Yes.

Q. Which takes the place of check No. 415 in that stub book? A. Yes.

Q. But the stub book contains no reference to a check numbered 415, dated September 1st to the order of C. H. Cahan, Jr., for $2,000? A. No, absolutely not. The entry in the stub book for check No. 415 is "New York Telephone Company, $9.27." I can either produce the stubs, or I can go through my notes here and show you.

Q. Unless defendant's counsel desires more particular testimony, or the production of the stub books, is it the fact that with respect to each one of these checks the check book either contains no stub bearing a check of the numbers and in the amount 152
hitherto described, or contains a notation such as the one which you have just testified—a stub of the same number, but a different payee and a different amount?

Mr. Veeder: I object to the question. What difference does it make? How can we be bound, unless you can show that we had some notice of the check book?

Mr. Hughes: That is not the purpose, your Honor. I conceive that there are two elements here; first, that these transactions as between the plaintiff and the agent were unauthorized and fraudulent; secondly, as be- 153
tween the plaintiff and the defendant, that the defendant had notice of the fraud.

The Court: Yes.

Mr. Hughes: Now, this evidence has no relation to the second thing.

The Court: It would not be binding upon this defendant at all—the stubs. I mean, even assuming that these stubs, as the testimony of the witness would indicate, show a

diversion of funds, that, of course, would not bring home to the defendant, in and of itself, knowledge of the fraudulent nature of the transactions.

Mr. Hughes: No, and it is not offered for that purpose. Of course, if Judge Veeder were prepared to stipulate that these checks, as between the agent and the plaintiff, were fraudulent checks——

Mr. Veeder (interposing): How can I? I do not know. I am waiting to see whether the witness knows.

155 The Court: I think you will have to take up your checks—each one of them—unless there is some kind of stipulation which you can enter into, which would shorten the proof. In other words, put your check stubs in evidence, stating that those are the only check stubs, and then the checks, and show that the face of the checks does not correspond with the stubs.

Mr. Veeder: The defendant is without any knowledge about the facts with respect to that.

The Court: Possibly you could put in a written resumé of the check stubs of these particular checks, and opposite each have a
156 notation with the actual number of the check bearing the corresponding number. If you can do that, I think it would shorten it very much.

Mr. Hughes: All right.

The Court: The real question is a question of law.

Mr. Hughes: Oh, yes; the real question is whether the defendant had notice, but as a preliminary measure I simply wanted to

make sure that there was no doubt about our establishing—that is, as between the agent and the principal—these things were fraudulent transactions.

Mr. Veeder: Of course, we do not want to throw away any available defenses, and unless you can prove that this money was misappropriated as alleged, your case falls on that ground.

Mr. Hughes: I conceive that I have already proved that through the testimony of the principal that he did not know of the drawing of these checks.

The Witness: I can give you the history of each of these checks. 158

By Mr. Hughes.

Q. Check No. 371, July 12, 1916, for $1,000, Plaintiff's Exhibit No. 5; what does the stub book show with respect to that?

The Court: The stub book can be identified. It may be that for some of those checks there are no stubs, and that for other checks there are stubs. Now, he can simply identify them, without its being binding on the defendant, and Judge Veeder can make a formal objection on the record, if he wishes, protecting any rights that might be transgressed or jeopardized. I think, in a trial under these circumstances, not before a jury of twelve, a good deal can be done that might not be appropriate before a jury of twelve. 159

Mr. Veeder: Oh, yes, of course. I do not know what the question is.

Mr. Hughes: I sought to clear it up by a general question, but there was objection to

that. Will the stenographer read the question?

(Question read.)

Mr. Vessler: I object to that question on the ground it is incompetent, irrelevant, immaterial and not binding on the defendant.

The Court: I do not know that that is binding on the defendant, and I would not receive it if it were intended, at this juncture, to be binding on the defendant. I think the objection would have to be sustained, if that were the purpose of the offer; but I take it that you are now identifying
161 these checks which were found by the witness, which he says he has theretofore had no knowledge of?

Mr. Hughes: Yes, your Honor.

The Court: With certain stubs purporting to be numbered with numbers corresponding to the numbers on these checks?

Mr. Hughes: Some of them, yes.

The Court: Or that he has examined all the check stubs that he has been able to obtain, and found no stub which contains a notation with respect to these checks. Now, I do not know that that proves anything at all.

162 Mr. Hughes: I state in offering this proof that I disclaim any contention that the defendant had any notice of what took place in the plaintiff's stub book. This proof is not offered in support of our contention that the defendant had notice. It is offered for the purpose of being cumulative to the testimony which the plaintiff has just given, that as between the plaintiff and C. H. Cahan, Jr.,

these checks were fraudulent checks. One bit of evidence showing that is the evidence that he covered them up.

Mr. Veeder: He did not testify to that, Mr. Hughes. He was not permitted to testify that it was fraudulent. In so far as his lack of knowledge is concerned, I object to it on the ground that it is irrelevant and immaterial.

Mr. Hughes: That testimony is already in the record.

The Court: I am in doubt about these stubs and the propriety of the question. I think that if you will frame your question 164
along the line of ascertaining what knowledge, if any, he had of these checks, which is merely amplifying his statement that he had no knowledge prior to the discovery, I will admit that, subject, of course, to objection and exception, and subject to being stricken from the record at the conclusion of the trial, if the Court subsequently determines, on motion, that they are not competent.

Mr. Hughes: I would be very glad to have this testimony taken under such a ruling, the decision on the question of admissibility to be reserved; that it be taken subject to a motion to strike out, which may be decided at 165
the time the case is finally concluded.

Mr. Veeder: That might lead us pretty far afield.

The Court: Yes, I am afraid it might.

By Mr. Hughes.

Q. Then, I will ask you in regard to anyone of these twenty-one checks——

The Court (interposing): Do not take this, Mr. Stenographer.

(Informal discussion off the record.)

The Court: Just offer them in evidence, assuming that they are all the stubs discovered, and the only ones of which he had knowledge with reference to these particular checks. Then the rest is matter of argument, and they will be received subject to defendant's objection, and also subject to a motion to strike them from the record. I assume you are going to offer the check stubs only that have to do with these particular checks?

167 Mr. Hughes: Of course, your Honor, in the case of a good many of them there is not any check stub that has to do with the particular check; the fact is simply that there is not any stub.

The Court: Then offer the check stubs.

Mr. Veeder: I thought that was the case with all of them. Is there something else that you offer this for besides the absence of the stubs?

Mr. Hughes: In some cases there is a stub of the same number, but to a different payee and for a different amount—apparently another check entirely, in other words.

168 *By Mr. Hughes.*

Q. Mr. Cahan, I show you thirteen books of check stubs (handing to witness).

Mr. Hughes: I would suggest to his Honor that it would be the quicker way to do it to go right through with these and have him testify where there is no stub, but when there is a stub showing a different payee

and a different amount, then have that stub marked in evidence.

Mr. Veeder: It is entirely immaterial to me how you do it, as long as I have my objection to the whole line of testimony, and an exception. It does not make any difference to me how you do it.

Mr. Hughes: It does not make any particular difference to me, so long as we can identify them sufficiently for the Court.

The Court: Perhaps you had better proceed in the way you had planned before.

By Mr. Hughes. 170

Q. With respect to Plaintiff's Exhibit No. 5, is there any stub in your stub books in connection with your account with the agency of the Bank of Montreal for any check numbered 371? A. No.

Mr. Veeder: May I have my objection as incompetent, irrelevant and immaterial?

The Court: Yes.

Mr. Veeder: And may I have it noted to all succeeding questions on this line, without specifically making the objection each time?

The Court: Yes, and the objection will be overruled for the present, with an exception to the defendant.

171

Mr. Veeder: Yes.

The Court: And the Court may, at a later moment, entertain a motion to strike it from the record.

Q. With regard to Plaintiff's Exhibit No. 5-A, is there any stub in the check book bearing such a number—bearing the number 387? A. There is a

corresponding stub in the check book for No. 387 of August 1, 1916. It shows——

The Court (interposing): Well, I suppose it speaks for itself.

The Witness: Yes, it speaks for itself. Why should I not tear that out?

Mr. Hughes: No, I would not tear it out.

The Court: No.

Mr. Hughes: I ask that that be marked.

The Court: Of course, all this is received for the present subject to the defendant's objection.

173 Mr. Veeder: Yes.

The Court: It really does not prove anything, as matter of fact, other than a stub with a number on it, and that that is the same number as appears on a check—one of these checks.

Q. This document that I hold in my hand, and which you have just produced, is a book of stubs of your checks on the agency of the Bank of Montreal, New York City, from June 19th, 1916, to August 6th, 1916, is it (handing papers to witness)? A. Yes.

Q. And that contains, does it, an entry of checks——

174

The Court (interposing): It speaks for itself.

Mr. Hughes: I was just going to read the stub into the record.

The Court: Then just read it to the stenographer. It is received subject to objection.

Mr. Veeder: Why do you not put it in just as it stands?

175

Mr. Hughes: All right. I will offer it as Exhibit No. 6.

(Paper marked Plaintiff's Exhibit No. 6.)

Q. I call your attention to the fact that that shows a check for $5,000 to the order of the Guaranty Trust Company. Are you able to testify as to whether there was any check for $5,000 to the order of the Guaranty Trust Company drawn on your account with the agency of the Bank of Montreal? A. Yes, but——

Q. (Interposing) I say, for $5,000? A. I think so, on that date. I think I saw on that date a check drawn on the Guaranty Trust Company— drawn on the agency of the Bank of Montreal for $5,000 in favor of the Guaranty Trust Company of New York. I think it was shown to me. I think probably I signed it, but no such check was deposited to my credit at the Guaranty Trust Company.

176

Q. And did any such check come back with your canceled vouchers from the agency of the Bank of Montreal? A. No.

Q. And was any check on that date, or on or about that date, for $5,000 to the order of the Guaranty Trust Company debited to your account or debited against your account with the agency of the Bank of Montreal? A. No other check except this check No. 387, Exhibit 5-A.

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Q. And that is the check that has been introduced in evidence, Plaintiff's Exhibit No. 5-A, to the order of C. H. Cahan, Jr.? A. Yes. I think it is obvious what happened.

Mr. Hughes: He entered check No. 387 to the order of the Guaranty Trust Company, which was the other bank in which his father

had an account, and the actual check with which his account with the agency of the Bank of Montreal was debited, was a check to the order of C. H. Cahan, Jr.

The Witness: I think what was done is obvious.

Q. But you are able to testify positively, are you, that on or about that date no other check $5,000 was debited to your acount with the agency of the Bank of Montreal, except Plaintiff's Exhibit No. 5-A to the order of C. H. Cahan, Jr.?

179 Mr. Veeder: Let the account show.

Mr. Hughes: I assume he is competent to testify.

The Court: I am afraid not. I am afraid the account itself would be the best evidence. Is that your objection, Judge? Is it your objection that the account itself is the best evidence as to whether or not it was debited or credited, as the case may be?

Mr. Veeder: Yes, the records are the best proof of that.

Mr. Hughes: Do I understand that you insist that we prove it from the records of the agency of the Bank of Montreal?

180 Mr. Veeder: You may do as you like. If you want to prove the fact, that is the way to prove it. I must object to taking this man's recollection of what it may have been, when you have something positive to show it, if it is material.

Q. Now, Plaintiff's Exhibit No. 5-B——

The Court (interposing): Is your question withdrawn for the present?

Mr. Hughes: Yes, your Honor. I have spoken to a representative of the agency of the Bank of Montreal, and he has promised to get a transcript of the account.

The Witness: I have a copy of that account here.

Q. Of the agency of the Bank of Montreal? A. Yes.

Mr. Hughes: Possibly the defendant's attorney would not accept it.

The Court: I think we had better take that up during the recess.

182

Mr. Veeder: Let me look at it. If it is prepared by any responsible person, I shall probably not object to it. I mean, we will take it up during the recess.

The Court: Yes. Then let us take a recess now until 2 o'clock.

RECESS.

AFTERNOON SESSION.

CHARLES HAZLITT CAHAN resumed the stand.

Direct examination (continued) by Mr. Hughes.

183

Mr. Veeder: If your Honor please, the attorney of record calls my attention to the fact that I have been perhaps a little hasty here, and if Mr. Hughes has no objection, if your Honor will look at the first, separate defense—that is, the eleventh numbered paragraph, it sets up the certification or acceptance of these checks by the depository banks.

The Court: Yes.

Mr. Veeder: I apprehend it is not really necessary to set them up separately, because the checks show on their backs or their faces just what was done, but it is desired that I keep that first, separate defense, so that the motion to amend would begin with the twelfth instead of with the eleventh.

The Court: I see.

Mr. Veeder: And I will take occasion now, while I am at it, to strike out the last sentence of the first, separate defense, beginning at the end of folio 11, "That this defend-
185 ant has not been negligent, but that the loss of the plaintiff has arisen from the negligence of the said Guaranty Trust Company of New York and of the agents of the Bank of Montreal, and from the negligence of the plaintiff as hereinafter set forth." I will strike that out of the first defense, but otherwise I will keep the first defense in, and begin my striking out with the twelfth instead of with the eleventh numbered paragraph. I think that will make it clear.

The Court: Very well.

Mr. Hughes: As to that defense, the plaintiff simply wishes to call the Court's attention to the fact that the proof submitted has
186 shown that instead of there being only one check that was not certified, there were two that were not certified, and as to the last check, the one which we haven't got, it does not appear one way or the other, whether it was certified or not.

The Court: I suppose if it had been, the certification records of the bank would show that, would they not? I think they keep a record of certified checks.

Mr. Hughes: The bank on which it was drawn?

The Court: Yes.

Mr. Veeder: Yes, I suppose that would show.

By Mr. Hughes.

Q. Now, Mr. Cahan, before recess we were going over these stubs with respect separately to each of these checks, and I have forgotten exactly what point we had reached, but it may not be amiss to repeat somewhat. I understand that in regard to Plaintiff's Exhibit No. 5, check No. 371, on the 188
Bank of Montreal for $1,000 to the order of C. H. Cahan, Jr., no stub for check No. 371 appears in the stub book? A. There is no stub.

Q. And there is no stub either, as I understand it, of any check on or about that date in the amount of $1,000 to the order of C. H. Cahan, Jr.? A. No.

Q. Now, in regard to Plaintiff's Exhibit No. 5-A, check No. 387, on the agents of the Bank of Montreal to the order of C. H. Cahan, Jr., in the amount of $5,000, there has been introduced in evidence a stub of a check for $5,000 to the order of the Guaranty Trust Company of New York on that date—A. (Interposing) Of the same number.

Q. And bearing the same number, 387? A. Yes.

Q. Now, does your stub book for the period in 189
question show any stub on or about that date of a check to the order of C. H. Cahan, Jr.? A. No.

Q. In the amount of $5,000? A. No.

Q. Or any other stub for $5,000 except that one to the Guaranty Trust Company? A. No.

Q. Now, Plaintiff's Exhibit No. 5-B, check No. 415, on the agents of the Bank of Montreal, to the order of C. H. Cahan, Jr., for $2,000, what is the fact with respect to that check?

Mr. Veeder: Are you now examining him about the situation or are you introducing—

Mr. Hughes (interposing): I am asking him whether there is any stub.

Mr. Veeder: Are you going to introduce these?

Mr. Hughes: The only one so far that there has been any stub bearing the same number, has been introduced in evidence as Plaintiff's Exhibit No. 6.

Mr. Veeder: Even so, where you rely on the absence of any stub, that section of the book ought to go in, ought it not?

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Mr. Hughes: The whole section?

Mr. Veeder: That little piece of it—whatever you call it.

Mr. Hughes: It seems to me that when the witness gives a categorical answer that there is no stub, that if you want to cross-examine him or to look at the stub book——

Mr. Veeder (interposing): All right.

The Witness: The only stub, No. 415, September 1, 1916, shows "N. Y. Telephone Company, $9.27."

Mr. Hughes: I ask that that be marked in evidence as Plaintiff's Exhibit No. 6-A—that stub.

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(Paper marked Plaintiff's Exhibit No. 6-A.)

The Witness: May I add a comment, and it may be stricken out if it is desired. I looked into that, and I found that that check for $9.27 had actually been paid by another check which I have.

Q. Then this is the only check, is it—the only stub in this stub book bearing the number 415? A. Yes.

Q. And is there any stub in the stub book indicating any check on or about September 1, 1916, in the amount of $2,000 payable to the order of C. H. Cahan, Jr.? A. No, there is not.

Q. The next is Plaintiff's Exhibit No. 5-C, check No. 435, on the agents of the Bank of Montreal, to the order of the Empire Trust Company in the amount of $3500. Is there any check for $3500 in your stub book? A. No, there is no check for $3500 in the stub book.

Q. And is there any stub in the stub book bearing any notation of a check bearing any number, drawn on or about September 20, 1916, in the sum of $3500 to the order of the Empire Trust Company? A. No. 194

Q. Plaintiff's Exhibit No. 5-D, check No. 449, on the agents of the Bank of Montreal, payable to the order of the Empire Trust Company in the amount of $1,000—is there any stub in the stub book bearing the number 449 of date September 1, 1916? A. September 20th?

Q. Yes, September 20. Did I say "September 1st"? A. Yes. September 30th, it should be.

Q. Yes, September 30 is right, No. 449. A. No. Stub No. 449, October 2, 1916, contains the note, "Guaranty Trust Company of New York, $1,000." 195

Mr. Hughes: I ask that that stub be marked in evidence as Plaintiff's Exhibit No. 6-B.

(Paper marked Plaintiff's Exhibit No. 6-B.)

Q. That is the only stub numbered 449 in the book? A. Yes.

Q. And is there any stub in the book with reference to any check or dated approximately or proximately to September 30, 1916, in the amount of $1,000 to the order of the Empire Trust Company? A. Oh, no; I never had any transaction personally with the Empire Trust Company in my life.

Mr. Hughes: I ask that that be stricken out.

Q. Is there any stub in that book on or at any date about September 30, 1916, containing any notation of a check in the amount of $1,000 to the
197 Empire Trust Company? A. No. I may as well say—I can say absolutely that there is no stub of any kind in any check book of mine purporting to be a check paid to the Empire Trust Company in my life.

Q. Plaintiff's Exhibit No. 5-E, check No. 456, on the agents of the Bank of Montreal, to the order of C. H. Cahan, Jr., in the amount of $670, is there any stub in the stub book for any check No. 456 on the agents of the Bank of Montreal? A. Yes, a check numbered 456, October 13, 1916, is entered in the stub as "Cash for telegram, $6.70."

Q. $6.70? A. Yes.

Q. And the amount of this check was $670? A. Yes.

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Mr. Hughes: Now, I ask that that stub be marked in evidence.

(Paper marked Plaintiff's Exhibit No. 6-C.)

Q. And is there any stub in your stub book of your account with the agents of the Bank of Montreal containing an entry of any check on or about

October 13, 1916, to the order of C. H. Cahan, Jr., in the sum of $670? A. No, no such amount was ever paid or entered.

Q. That is, when you say it was never paid, you mean never entered in the stub book? A. Yes.

Q. Plaintiff's Exhibit No. 5-F, check No. 473, on the agents of the Bank of Montreal, to the order of C. H. Cahan, Jr., in the amount of $1,000, is there any check numbered 473 in your stub book of your account with the agents of the Bank of Montreal? A. No. 473?

Q. Yes. A. 473 in the stub book, November 1, 1916, is entered, "Cash, box of cigars, $5.25."

200

Q. That is the only stub bearing the number 473, is it? A. Yes.

Q. And is there any stub showing any check on or about November 1, 1916, on the agents of the Bank of Montreal in the sum of $1,000 to C. H. Cahan, Jr.? A. No, none at all.

Q. Plaintiff's Exhibit No. 5-G, check No. 495, on the agents of the Bank of Montreal, to the order of C. H. Cahan, Jr., in the sum of $1,000, is there any check numbered 495 in the stub book of the agents of the Bank of Montreal? A. Yes, sir.

Mr. Veeder: You did not offer that last one.

Mr. Hughes: I beg your pardon. Thank you. I offer that stub, No. 473.

201

(Paper marked Plaintiff's Exhibit No. 6-D.)

Q. Now, to return to my last question, is there any stub bearing the number 495 in your stub book with the agents of the Bank of Montreal? A. Yes, stub No. 495 is dated November 16, "Paid for notarial certificate, County Court, clerk's fees, $1.95."

Mr. Hughes: I ask that this be marked in evidence.

The Court: Was that November 16th?

The Witness: Yes.

(Paper marked Plaintiff's Exhibit No. 6-E.)

Q. Is there any other stub in that book bearing the number 495? A. None.

Q. Is there any stub bearing any notation of a check on or about November 17, 1916, in the amount of $1,000 to the order of C. H. Cahan, Jr.? A. No,
203 nothing, sir.

Q. Plaintiff's Exhibit No. 5-H, check No. 514, on the agents of the Bank of Montreal, to the order of C. H. Cahan, Jr., in the amount of $1,000, is there any stub in your stub book of the agents of the Bank of Montreal bearing the number 514? A. Yes.

Q. What does that show? A. Cash, $7.50. That is for petty cash. Stub No. 514, December 1, 1916. That is a petty cash item of $7.50.

Q. Is there any other stub numbered 514 in the stub book? A. None.

Q. Is there any stub in the stub book indicating any check on or about November 29, 1916, in the amount of $1,000 to the order of C. H. Cahan, Jr.?
204 A. No, there is no such transaction shown here.

Mr. Hughes: I ask that this stub, No. 514, be marked in evidence.

(Paper marked Plaintiff's Exhibit No. 6-F.)

Q. Now, Plaintiff's Exhibit No. 5-I, check No. 569, on the agents of the Bank of Montreal, dated January 2, 1917, to the order of C. H. Cahan, Jr.,

in the amount of $1,000, is there any stub bearing the number 569? A. Yes, a stub numbered 569, January 2, 1917, to petty cash, an item of $5.

Mr. Hughes: I ask that that be marked in evidence.

(Paper marked Plaintiff's Exhibit No. 6-G.)

Q. Is there any other stub numbered 569 in the stub book? A. No.

Q. Is there any stub in the stub book indicating a check on or about January 2, 1917, in the amount of $1,000 to the order of C. H. Cahan, Jr.? A. No, 206
there is no such stub.

Q. Plaintiff's Exhibit 5-J, a check without number, dated January 3, 1917, on the Guaranty Trust Company to the order of the Empire Trust Company in the amount of $3,000. Is this your check book on the Guaranty Trust Company containing the stubs of the checks drawn on that account (handing book to witness)? A. It is.

Q. Is there any stub— A. (Interposing) What date is this?

Q. January 3, 1917? A. No, there is no stub of that date at all.

Q. No stub of January 3 at all? A. No.

Q. And no stub dated on or about that date for 207
the amount of $3,000 to the order of C. H. Cahan, Jr.? A. No, no transaction of that kind at all.

Q. Plaintiff's Exhibit No. 5-K, check without number, dated January 13, 1917, on the Guaranty Trust Company to the order of C. H. Cahan, Jr., in the amount of $4,000, is there any check in the Guaranty Trust Company stub book corresponding with that check? A. No, there is no stub at all.

Q. Is there any stub dated January 13, 1917? A. No.

Q. Is there any stub on or about that date, in the amount of $4,000, payable to the order of C. H. Cahan, Jr.? A. No, there is no transaction of that kind indicated or stub entered.

Q. Plaintiff's Exhibit No. 5-L, check No. 34, on the Guaranty Trust Company, dated March 22, 1917, to the order of C. H. Cahan, Jr., in the amount of $5,000, is there any stub numbered 34?

The Court: $500?

Mr. Hughes: Yes, $500, I should have said.

The Witness: There is a stub numbered 34. It is dated May 12, 1917, payable to J.
209 L. Hetherington, to pay fully on account retaining wall, $1,000, and I have that check. That was in connection with building a new retaining wall against the sea at my summer residence at Halifax, and I have that check. That is May 12th, numbered 34.

Q. There is no other No. 34? A. There is no other No. 34 entered, and no transaction of the kind of $500 of March 22, 1917.

Q. To the order of C. H. Cahan, Jr.? A. No. The only other item in March at all is an item of $350 on March 22, where I paid a draft drawn on me to the agents of the Bank of Montreal, $350.

210 The Court: That is your own draft you mean?

The Witness: No, it is a draft drawn on me by Mr. Saunders, who was doing some business for me.

Q. There is no stub showing any check drawn to the order of C. H. Cahan, Jr., on or anywhere near March 22, 1917? A. No.

Q. In the amount of $500? A. No, no such transaction.

Mr. Hughes: I ask that this stub, No. 34, be marked in evidence.

(Paper marked Plaintiff's Exhibit No. 6-H.)

Q. Plaintiff's Exhibit No. 5-M, check without number, dated April 12, 1917, to the order of C. H. Cahan, Jr., in the amount of $500, is there any stub corresponding with that check in the Guaranty Trust Company stub book? A. The check has no number, and there is no corresponding stub entry at all for that sum.

Q. Is there any stub on or anywhere near April 212
12, 1917, in the sum of $500? A. No.

Q. To the order of C. H. Cahan, Jr.? A. No, there are no entries in the stubs for the month of April at all.

Q. And none anywhere near then to the order of C. H. Cahan, Jr.? A. No, there is none in the entire book to the order of C. H. Cahan, Jr.—nothing.

Q. Plaintiff's Exhibit No. 5-N, check without number, dated May 26, 1917, on the Guaranty Trust Company to the order of C. H. Cahan, Jr., in the amount of $750. Is there any corresponding stub in the Guaranty Trust Company's stub book? A. No, there is no corresponding entry in the stub book at all. There is no item of $750, and no entry 213
at all on May 26.

Q. And you have already testified, as I understand it, that there are no stubs indicating any check to the order of C. H. Cahan, Jr., in the whole Guaranty Trust Company stub book? A. No.

Q. So that will obviate further questions of that sort. Plaintiff's Exhibit No. 5-O, check without a number, dated May 29, 1917, on the Guaranty Trust

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Company to the order of C. H. Cahan, Jr., in the amount of $500. Is there any— A. (Interposing) No corersponding stub entry for a check of that kind or at that date.

Q. Plaintiff's Exhibit No. 5-P, check without number, dated July 27, 1917, on the Guaranty Trust Company to the order of C. H. Cahan, Jr., in the amount of $500, is there any stub bearing any relation to such a check? A. No, there is no stub. The checks entered in July are two checks numbered 40 and 41. One is to pay interest on a mortgage, No. 40, which is a valid check, and the other one
215 was to pay the Collector of Internal Revenue of the United States my income tax. I was charged an income tax while I was here. No other entries of any kind relating to this item of July 27, 1917, in the stub book.

Q. Plaintiff's Exhibit No. 5-Q, check No. 39, on the Guaranty Trust Company, August 20, 1917, to the order of C. H. Cahan, Jr., in the amount of $1,000, is there any stub numbered 39 in the book? A. There is no stub. There is a blank where 39 might have been, with a date marked out—a date in August, 1919, but there is no corresponding entry for any item at all.

Mr. Hughes: I ask that that page be
216 marked in evidence.

(Papers marked respectively Plaintiff's Exhibits 6-I and 6-J.)

The Court: Of course, that is no evidence. It might have been anything.

Mr. Hughes: Yes, absolutely. The only point is that the checks run numbered 37, 38, 40, and 41, and 39 is left out.

The Court: You mean there is an intervening number that is left out?

Mr. Hughes: Yes.

Q. Plaintiff's Exhibit 5-R, check numbered 123, dated August 31, 1917, on the agents of the Bank of Montreal, to the order of C. H. Cahan, Jr., in the amount of $500. Is there any stub in the stub book of the account with the agents of the Bank of Montreal bearing the number 123? A. August 31, 1917?

Q. Yes. A. There must be another entry——

Q. (Interposing) That is August, 1917. I can not find that stub book. A. It has been mislaid, 218 apparently.

Q. Can you testify as to whether there was any stub? A. Yes, there was a stub of check No. 123, reading "Dr. Gibbs, $24," and I found another check which I gave you, bearing no number, by which Dr. Gibbs was paid his account of $24.

Q. Is this the check (handing paper to witness)? A. Yes, this is the check without number, and the lead pencil mark "123" was marked when I was sending it to you. That is my own mark to identify it. Dr. Gibbs was paid by this check. The entry in the stub book is as I have stated. I think you will find that somewhere amongst the papers.

Mr. Hughes: I ask that that be marked for 219 identification.

(Paper marked Plaintiff's Exhibit No. 6-K for Identification.)

Q. Plaintiff's Exhibit No. 5-S, check No. 121, dated September 1, 1917, on the agents of the Bank of Montreal, to the order of C. H. Cahan, Jr., in the amount of $350, is there any stub in the stub

book bearing the number 121? A. Yes, there was, and it was in favor of some—suppose I go through this again. It was in favor of some legitimate item, I remember, and what it turned out to be, there were two checks numbered 121—this one for $350, which is in evidence, and another valid check for some personal account of mine numbered 121, which was entered in the stub book.

Q. But this check, numbered 121, to the order of C. H. Cahan, Jr., in the amount of $350, was there any entry in the stub book of that sort? A. No, no entry at all.

221 Q. And in regard to Plaintiff's Exhibit No. 5-R, was there in the stub book any entry of any checks on or about August 31, 1917, showing a check to the order of C. H. Cahan, Jr., for $500? A. What was that check?

Q. That was the last one. I simply omitted to ask you that question. Is there any stub in the stub book for that? A. No. In the stub book for check 123 it was marked "Dr. Gibbs, $24," which was paid by a check which I produced, which has no number.

Q. And there was no stub in the stub book indicating a check on or about August 31, 1917, to the order of C. H. Cahan, Jr., in the amount of $500? A. Oh, no.

222 Q. Now, the last one is this check which we have not got, and which is not in evidence, in the amount of $2,400, dated October 15, 1918, for the sum of $2,400 on the Guaranty Trust Company, payable to the order of C. H. Cahan, Jr., or the defendant, Empire Trust Company. Is there in the Guaranty Trust Company stub book any stub corresponding to such a check, October 15, 1918? A. No, nothing at all.

Q. You have already testified that there is no stub in the Guaranty Trust Company stub book indicating any check to the order of C. H. Cahan, Jr. Is there any stub, I ask you now, in the Guaranty Trust Company stub book indicating any check to the order of the Empire Trust Company? A. No. I have not found that check, and I traced them partly through the kindness of the Guaranty Trust and partly that of the Empire Trust. I must say that the Empire Trust gave me every assistance in getting into these matters.

Q. Mr. Cahan, these fourteen books of stubs, are those all books of stubs in relation to your account with the agents of the Bank of Montreal, New York City? A. You have all the stub books for that period, except this one to which we have just referred, which is missing, and which I think must either be in your office or in one of my bags, because I had it in making these notes. 224

Q. And except for that one, these are all the stub books on the agents of the Bank of Montreal that are now in your possession? A. I gave you everything, yes.

Q. Well, anyway, all of these are stub books of your checks on the agents of the Bank of Montreal? A. Yes, quite so.

Mr. Hughes: I ask that these be marked for identification. You had better give them another number and mark them A, B, C, etc. 225

Q. And is this book your only book of stubs of checks on your account with the Guaranty Trust Company (handing book to witness)? A. I believe so.

Mr. Hughes: I ask that this be marked for identification.

Q. Mr. Cahan, did you at any time have any account of your own with the Empire Trust Company? A. Never.

Q. Did you ever have any transactions of any kind with the Empire Trust Company? A. No personal transactions with the Empire Trust Company in my life. I signed checks paying out, sir, sixty or seventy millions of dollars in New York, in a representative capacity, and they went everywhere, but I have never had any personal transaction with the Empire Trust Company.

Q. Was there any transaction of yours by reason
227 of which moneys of yours would properly be payable to the Empire Trust Company? A. No, I never owed them a cent, and never had a transaction with them in a personal capacity for a cent in my life. I remember treating with them once with regard to a trust deed in connection with a trust we thought of establishing in connection with the——

Q. (Interposing) Was that purely a legal matter? A. It was purely a legal and financial matter, in which we did not need their assistance in fact. Then I signed checks in a representative capacity, as I said—and I might have said nearer seventy millions of dollars, and I cannot remember where they went. They went to all sorts of banks in this city.

228 Q. They were not signed by you personally? A. No.

Q. Or on your personal account—any personal account of yours? A. No, they had nothing to do with any personal account of mine.

Q. Coming specifically to the three checks which have been marked in evidence, payable to the order of the Empire Trust Company, or four checks, if it should turn out that the check of October 15, 1918, was to the order of the Empire Trust Company,

was there any transaction of yours— A. (Interposing) They did not represent any transaction of mine.

Q. Now, I believe that you have already testified that you had no knowledge that C. H. Cahan, Jr., had ever opened any account with the Empire Trust Company? A. No.

Q. You never authorized or instructed him to open any such account? A. No, I never knew that he had a personal account with them, and I did not know that he had a personal account in the city, in fact. I did not think there was any transaction in which he would necessarily need a personal account. 230

Q. Now, with regard to these other checks, or with regard to all these checks, these twenty-one checks that have been introduced in evidence, or the twenty-first that has not been introduced in evidence, was there any transaction between you and C. H. Cahan, Jr., by virtue of which the moneys shown on any of these checks were properly payable from you to C. H. Cahan, Jr.? A. No.

Q. Were any of these checks drawn for any purpose of your own? A. They were not drawn for any purpose of my own.

Q. When you learned of these checks that had gone into the Empire Trust Company, did you, as soon as you had collected the facts and knew the 231
facts, write to the defendant, Empire Trust Company, with respect to it? A. Yes.

Q. Is this your letter advising them of the facts (handing paper to witness)? A. Yes.

Q. Is that your first letter to them? A. Yes, that is my first and original letter to them.

Mr. Hughes: I offer that letter in evidence.

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Mr. Hughes: The agents of the Bank of Montreal I understand are preparing a similar transcript from June 1, 1916, through the year 1917, which is the period covered by these transactions, and that I desire to offer at a later time.

The Witness: I can give you a typewritten copy of what they furnished for the other suit, and which was put in evidence there.

Mr. Hughes: Then may we offer that, subject to correction, or had you rather wait until this one arrives?

239 Mr. Veeder: It makes no difference to me, Mr. Hughes.

Mr. Hughes: Then let us wait until that one arrives. As the next item of documentary proof, your Honor, without conceding the correctness of the same, but as an admission by the defendant of the state of the account of C. H. Cahan, Jr., with the defendant from the opening until the close of the same, I offer the pages from the book of account of the Empire Trust Company containing entries with respect to that account, and physically offer what has been handed to us by the Empire Trust Company as a photostatic copy thereof.

240 Mr. Veeder: Why all this caution? You looked at the books, did you not?

Mr. Hughes: Well, we did not compare it. We might not concede that it was correct.

(Papers marked Plaintiff's Exhibit No. 11.)

Mr. Hughes: We have not gone over this in detail. We want to call attention to one feature in order that the defendant

may not be surprised, and may meet it in any way that they see fit on their case. Of date on this account, July 29, 1916, there appears a credit item of $5,000, and immediately under that also apparently of date July 29th a debit item of $2,500. I may say that that credit of $5,000 is the only $5,000 credit on this account anywhere near that date. From Plaintiff's Exhibit No. 5-A in evidence, check No. 387 on the Bank of Montreal to the order of C. H. Cahan, Jr., in the amount of $5,000, it appears that that check was dated August 1st, accepted by the agents of the Bank of Montreal on August 1st, and 242
paid through the Clearing House on August 2nd. Therefore, this account is apparently in error with respect to the date on which that check was paid into the account. That is, instead of going in on July 29, 1916, it went in either on August 1st or August 2nd, 1916. The materiality of that is that unless this debit item of $2,500, which, on the face of the account, also appears as July 29, 1916 —unless that is also an error, the account was overdrawn from July 29th to August 1st or 2nd, 1916. I simply wish to point that out so that the defendant can meet it in any way it can. 243

By Mr. Hughes.

Q. Mr. Cahan, I show you a letter or what purports to be a letter signed by C. H. Cahan, Jr., to the Empire Trust Company, dated June 16, 1916, which letter has been produced in response to a subpoena which we served on the Empire Trust Company, and I ask you if that is C. H. Cahan,

Jr.'s signature (handing paper to witness)? A. Yes.

Mr. Hughes: I ask that that be marked for identification.

(Paper marked Plaintiff's Exhibit No. 12 for Identification.)

Q. There is mentioned in that letter a note of Edward L. Doucette, Hamilton Apartment, for $1,092.50. Did that note represent any transaction of yours? A. No.

245 Q. Did you have any knowledge of it? A. I never knew a man by the name of Edward L. Doucette, and had no transactions with any such man.

Mr. Hughes: I ask that there be marked for identification—a letter signed blank assistant secretary. I take it that is a letter from the Empire Trust Company to C. H. Cahan, Jr., of date August 3, 1916—rather, that it is a carbon copy of a letter (handing paper to Mr. Veeder).

(Paper marked Plaintiff's Exhibit No. 13 for Identification.)

By Mr. Hughes.

246 Q. I show you another letter, dated August 21, 1916, purporting to be signed by C. H. Cahan, Jr., to the Empire Trust Company, and ask you if that is C. H. Cahan, Jr.'s signature (handing paper to witness)? A. Yes.

Mr. Hughes: I ask that that be marked for identification.

(Paper marked Plaintiff's Exhibit No. 14 for Identification.)

Q. That also mentions this Mr. Doucette. You had no knowledge of the transaction mentioned in that letter (handing paper to witness)? A. No, I never knew of any Edward L. Doucette. It represents no transaction of which I was cognizant, nor did I ever know any John B. Newman, or have any knowledge of him.

Q. I show you letter, dated August 21, 1917, to the Empire Trust Company, purporting to be signed by C. H. Cahan, Jr., and ask you if that is C. H. Cahan, Jr.'s signature (handing paper to witness)? A. Yes.

Mr. Hughes: I ask that that be marked 248
for identification, together with the carbon copy of what purports to be the reply of the Empire Trust Company to C. H. Cahan, Jr., dated August 22, 1917.

(Papers marked Plaintiff's Exhibit No. 15 for Identification.)

Q. I show you a letter, dated August 31, 1917, to the Empire Trust Company, purporting to be signed by C. H. Cahan, Jr., requesting the credit of a check for $500 to the credit of his account, and I ask you if that is his signature (handing paper to witness)? A. Yes.

Mr. Hughes: The letter, dated August 31, 249
1917, is offered in evidence.

(Paper marked Plaintiff's Exhibit No. 16.)

Q. I show you another letter, dated September 1, 1917, to the Empire Trust Company, purporting to be signed by C. H. Cahan, Jr., and requesting the deposit of a check to the credit of his account, and I ask you if that is C. H. Cahan, Jr.'s signature (handing paper to witness)? A. Yes.

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Mr. Hughes: I ask that that be marked in evidence.

(Paper marked Plaintiff's Exhibit No. 17.)

Q. I show you a letter, dated September 5, 1917, to the Empire Trust Company from C. H. Cahan, Jr., and ask you if that is C. H. Cahan, Jr.'s signature (handing paper to witness)? A. Yes.

Mr. Hughes: I ask that that and what seems to be a carbon copy of the reply of the Empire Trust Company to C. H. Cahan, Jr.,
251 dated September 6, 1917, be marked for identification.

(Papers marked Plaintiff's Exhibit No. 18 for Identification.)

Mr. Hughes: You may cross-examine.

Cross-examination by Mr. Veeder.

Q. Mr. Cahan, your son came to New York to live in May, 1915? A. Yes, about that time he came here.

Q. How old was he at that time? A. He was born on October 20, 1861—I think it was October
252 20th. Certainly, it was October, 1861.

Q. He was a barrister? A. Yes.

Mr. Hughes: 1861?

The Witness: No, I am speaking of my own birth. My son was born in October——

Q. (Interposing) Well, at the time of these transactions he was about thirty years old, was he? A. Yes, about that. Will you pardon me just one moment? He was born in 1887, in October.

Q. Well, it is unimportant, the exact date. He was a barrister? A. Yes.

Q. Did he ever practice in Montreal—was he with you? A. He was practicing—in Halifax he took his degrees first in an office with which I was connected, with the present Chief Justice of Nova Scotia, and then he went to Vancouver, where he practiced himself and was admitted to that bar, and then he came back, I should think, about 1913, is my memory, to Montreal to my office.

Q. In Montreal? A. Yes.

Q. Did you bring him down here to New York? A. He came——

Q. (Interposing) Or was it at your instigation 254
that he came to New York? A. Yes, he came at my request.

Q. And for what purpose? A. He came to assist me in connection with the legal matters which I was then attending to, which were very voluminous and very important.

Q. He had no business here of his own, on his own account? A. No, he came solely at my request; that is, so far as I know he had no private business here.

Q. Did he have any personal means, or what were his means of livelihood? A. He came here with his wife at my request, on the understanding that I was to pay the expenses of, you know, the family 255
expenses, which I did. They were living with me, and I paid him $225 a month. I told him that at the end of the year, when all things had turned out all right, I would give him a bonus, and I think his bonus at the end of the year, which I paid, was five or six thousand dollars.

Q. And did he draw any of this compensation, as we will call it, out of your accounts in the Guaranty Trust Company and the Bank of Montreal? A.

He drew nothing, so far as—I am dealing now from memory—so far as I know on the Guaranty Trust Company at all, but he did draw checks on the agents of the Bank of Montreal and cashed them, out of which he took his $225 a month. I may say, in addition to that, that I paid any traveling expenses that he had.

Q. Did he pay those accounts out of the deposits in the Bank of Montreal and the Guaranty Trust Company? A. No.

Q. Where did he get the money to pay them? A. I arranged at the office of the agency of the
257 Canadian Car & Foundry Company with the treasurer that when he was sent away traveling that they would make an advance and take a receipt and adjust it later. That was a matter from week to week or month to month.

Q. He was an officer of that company? A. He was nominally secretary of it.

Q. What do you mean by "nominally"—was he or was he not an officer of that company? A. He was appointed secretary of it, yes.

Q. Now, when he came down here he and his wife lived with you for a time at the Manhattan Hotel, did they not? A. Yes.

Q. Then you took an apartment? A. Yes, in October, if I remember, 1915, I took an apartment,
258 which I kept until August, 1917.

Q. How was that apartment paid for, the rent? A. The rent was paid for by the agency of the Canadian Car—they paid the rent.

Q. Do you know that? A. I know that as a fact, yes, absolutely, and besides that I brought with me an old household housekeeper, who kept the apartment, and I also brought with me then my old butler, who had been with me and who had enlisted, and got into bad health in the early part

of the campaign and came back, and he came with me here, and so I had those two who were conducting the apartment—old servants of mine.

Q. You have not made entirely plain to me on your direct examination what your purpose was in giving these powers of attorney to your son. A. I beg your pardon?

Q. You have not made it entirely clear to me, at all events, on your direct examination, what your purpose was in giving these powers of attorney to your son. A. My purpose in giving these powers of attorney to my son was to be able from time to time, through him during my absence or engagements elsewhere, to pay my personal living and 260
other expenses in the City of New York.

Q. And you expected him to do that as your attorney-in-fact? A. Beg pardon?

Q. And you expected him to pay those accounts as your attorney-in-fact? A. If during my absence, I expected him to pay them as they came in. When I was present I signed the checks when they came to me, and all the accounts were submitted to me, but I did not sign the checks to all of them at other times, when I was in New York. I was engaged then, well, many hours in the day, and sometimes the bills would come in——

Q. (Interposing) Well, he was supposed to take up the slack, anyway, as we say? I do not know 261
whether you understand that slang in Canada or not. A. Yes, he was there helping me.

Q. Now, having regard for the terms of your power of attorney to the Guaranty Trust Company, authorizing him to sign, endorse, deposit, draw and deliver all such checks and other orders for the payment of money as he may deem proper in connection with any— A. (Interposing) Will you read that a little louder, please?

Q. I am reading a passage from power of attorney you gave to the Guaranty Trust Company, authorizing your son to sign, endorse, deposit, draw and deliver all such checks and other orders for the payment of money as he may deem proper in connection with any kind of funds on deposit which I may now or hereafter have with the Guaranty Trust Company of New York—how do you undertake to say, as you have on your direct examination, that no one of the twenty-one checks in issue was drawn for any purpose of your own? A. Because that is——

263 Mr. Hughes (Interposing): I object to that.

Mr. Veeder: It is cross-examination.

The Court: Yes.

A. (Continuing) Because that is an absolute fact.

Q. Is that the only answer you have to make? A. None of those—I have audited myself the accounts, and I am accustomed to accounts, and I have had assistance in examining those accounts, and I can say that there was not a dollar of that money which was paid out which was for any purpose or business of mine.

264 Q. Mr. Cahan, have you, in fact, any knowledge at all as to what he did with the proceeds of those twenty-one checks? A. I have hearsay knowledge, yes.

Q. Well, what? A. I understand that he had——

Q. (Interposing) No, not what you understood. A. I told you I had hearsay knowledge. I found out and know that he had at least four or five stock accounts in Montreal, and I have discovered that he was engaged in stock gambling in New York.

Q. Well, suppose he was? I am talking about the proceeds of these twenty-one checks, and unless you can trace the proceeds of those twenty-one checks you do not know what he used them for. A. Do I know what he used the proceeds of the twenty-one checks for?

Q. Yes. A. They were deposited to his credit with the Empire Trust Company.

Mr. Hughes: I object to the form of the question. The proceeds of the check went into his personal account in the Empire Trust Company.

Mr. Veeder: I asked what he did with the 266
proceeds of the checks. We paid out the checks.

Q. Now, I am talking about the proceeds of the checks, of these twenty-one checks. Do you know anything at all about what he did with the proceeds of those?

Mr. Hughes: I object to that, if your Honor please, as incompetent, irrelevant and immaterial.

The Court: No, I think it is perfectly proper cross-examination.

Mr. Hughes: It is immaterial what he did with the funds that he had on deposit 267
with the Empire Trust Company.

Mr. Veeder: It is charged that he misappropriated them.

The Court: Yes.

Mr. Hughes: And he did misappropriate them the moment they went into his account in the Empire Trust Company. It is immaterial what happened to them after that.

The Court: No.

Mr. Hughes: I take an exception.

Mr. Veeder: You do not base your claim only on the ground that he deposited them in his account, but also on the ground that we paid his checks.

The Court: Objection overruled.

Mr. Hughes: Exception.

Mr. Veeder: Repeat the question, please.

(Question read.)

A. I think we misunderstand each other. We are talking two different languages probably. I understand that the proceeds of each one of those
269 checks——

Q. (Interposing) Never mind what you understand. A. (Continuing) —were received by the Empire Trust Company.

Q. Were what? A. Received by the Empire Trust Company.

Q. Were received by the Empire Trust Company? A. Yes, they received the checks, and the Empire Trust Company collected those checks as holder for value of the checks. Then the next transaction, that would be, accordingly, as I understand it, a loan from him to the Empire Trust Company, which stood to his credit.

Mr. Veeder: May I move that that be
270 stricken out? There is no proof of any loan at all. I move to strike out the answer as not responsive.

The Court: Yes, strike it out.

Q. Now, will you answer my question? I do not want to argue the legal proposition with you. I am asking you for the fact? Will you answer my question?

Mr. Veeder: Repeat the question, please. (Question read.)

A. Well, if you mean the credits which he had with the Empire Trust Company by reason of the transaction of cashing those checks—if that is what you mean——

Q. (Interposing) It was part of the credit, undoubtedly. A. If that is what you mean——

Q. Yes, that is what I mean. A. I do not know what he did with it. I have no definite knowledge. Would you allow me to add by way of explanation——

Q. (Interposing) If it is material. A. (Continuing) —that I do know that no personal or business accounts of mine were paid—— 272

Mr. Veeder (interposing): No. I move that that be stricken out.

The Witness: Well, I am absolutely sure of it.

Mr. Hughes: I submit that that is perfectly proper.

The Court: I will let that part of the answer stand. He has already testified to that, anyhow.

Mr. Veeder: I probably interrupted him before he got through. What did he say? 273

The Court: He said he did know that no part of any of those checks went for any personal or business matters of his.

Q. Well, how do you know that?

The Court: The stenographer had better give us his answer, and not rely upon the recollection of the Court.

(Answer read.)

Q. Well, how do you know that if you do not know what he did with it? A. Well, I know what he——

Q. (Interposing) Did with it? A. I know what my personal accounts were. I know absolutely what I incurred in the way of personal accounts. I know that absolutely—what my own expenditures were—that is, what my own liabilities were; and I know that those were not paid by any personal checks of his drawn by him on a trust company.

Q. Well, do you keep books? A. Beg pardon?

Q. Do you keep books? A. Well, I did not keep
275 books in—any books of account in New York. I kept—as to my own expenditures, when they came in I knew exactly what they were.

Q. Well, how do you know what he paid of your expenses, as you term it? A. Beg pardon?

Q. Did he render any account to you of what expenses of yours he paid out of these funds? A. At the end of every month I kept a statement of every personal expense of mine, and I turned in that statement of personal expenses of mine to the treasurer of the Trust, and that was audited and my items were delivered up to them as an itemized statement for the purpose of their audit of my expenses, so that I knew within $5, I might say,
276 any month of what my personal expenses were in connection with my work and private life and family life, and everything else.

Q. And it is your testimony now that your intent and purpose was, apart from the question of what the legal authority was that you gave your son—your intent and purpose was that he should pay out of those accounts under this power only these items of personal expense that you tendered him? A. Absolutely, except this one.

Q. Your answer is yes? A. Please repeat that.

Q. Apart from the question of what his legal authority was under the power you gave him, I understand you say now that your intent and purpose was that he should pay out of those accounts only the personal expenses which you handed to him or mailed to him? A. I never mailed anything to him.

Q. Well, how did he get it? A. How did he what?

Q. How did he get these items that you designed he should pay out of this account? You were in all parts of the world? A. At times, yes, but the items 278
are so limited—there was my private secretary, there was a certain amount allowed my butler each month to pay the household expenses, which he attended to—my son did not attend to the household expense; and then there were small items coming in. If I remember correctly, I paid the telephone bill, because I had that put in. I was not allowed a telephone in my work; and a very few items of that kind. So far as the Guaranty Trust Company's account was concerned, the valid checks drawn on that were very, very few, indeed. That was not an account which we used for personal expenditures.

Q. I will have to ask the Court to strike out your characterization of "valid." A. Well, may I change 279
that? So far as the checks which went for any legitimate purpose of mine or to pay any liability of mine——

Q. (Interposing) So far as you know? A. So far as I know—and I know the whole thing clearly.

Q. And yet you do not know what he did with the proceeds? A. Simply because all the checks which he drew are in the possession of the Empire

Trust Company, and I have never seen them, but I presume he took them back, and I have not seen them.

Q. The terms of the power to the agents of the Bank of Montreal, under the terms of that power you authorized your attorney-in-fact to receive all the paid checks and sign all the bank's forms of settlement of balance, ratifying all that he might do in the premises?

Mr. Hughes: I object to this as incompetent, immaterial and irrelevant.

Mr. Veeder: They are in evidence.

281 Mr. Hughes: Yes, but that question is not material. The witness has told you about the canceled checks on the Empire Trust Company. This power of attorney relates to canceled checks on the Bank of Montreal.

Mr. Veeder: I know. I asked the question.

The Witness: Will you please repeat it?

Mr. Veeder: Read it, Mr. Stenographer. (Question read.)

Mr. Hughes: I withdraw the objection.

A. I signed that power of attorney that you are

282 quoting, yes.

Q. And he did—your son did—in the exercise of that power receive all the paid checks? A. I ascertained so since his disappearance. I had no knowledge of it before.

Q. It was a period of three years, was it not, when he held this power? Did you ever examine these vouchers yourself?

Mr. Hughes: I object. What materiality has this?

The Court: It is cross-examination. Overruled.

Mr. Hughes: Exception.

A. Except for——

Q. (Interposing) How do you answer, yes or no? A. If you will allow me—will you put it again?

Q. Will you first answer that categorically? A. Will you please repeat it? I will answer it categorically if I can, yes.

Q. During the period of, we will call it, three years in which your son held this power and this right did you ever yourself examine the canceled vouchers or examine the state of the account? A. 284
No, so far as my memory goes I never saw them.

Q. Well, how about the Guaranty Trust Company, did you entrust the same duty to him on that account? A. No.

Q. You examined it yourself, did you? A. I never received an account from the Guaranty Trust Company. I never received a check and I never examined one until after his disappearance.

Q. Well, do you know whether he did? A. I am informed by somebody since this litigation begun—I have heard the suggestion—in fact, they have pleaded, I think——

Q. (Interposing) Well, you have had negotiations with the Guaranty Trust Company, I suppose, 285
since this cause of action arose, and have you ever asked them whether they have these canceled vouchers there yet? A. The vouchers or checks?

Q. Yes. A. The checks that were drawn were found in this iron box, as I told you.

Q. You never examined the account yourself at all? A. I never received any account from the Guaranty Trust Company.

Q. Well, you never examined them? A. Therefore I never examined them, because I never had them in my hands until after the disappearance of my son.

Q. Now, you have brought a suit against the Guaranty Trust Company? A. Yes.

Q. For some of the checks on which this complaint is based? A. Yes.

Q. That includes some of the checks on which you are suing in this case? A. Yes. I think the Guaranty Trust Company checks, which are included in this list of twenty-one, also enter into
287 a suit with other items of the Guaranty Trust Company.

Mr. Veeder: Now, your Honor, that is all for the present. I cannot say whether I want to cross-examine on these stubs here until I examine them. I would like to reserve that right.

The Court: Yes.

The Witness: I would like to make just one explanation. May I make an explanation?

Mr. Veeder: I cannot tell until I hear it.

The Witness: Well, it is in your favor.

The Court: You mean you want to modify
288 some of your testimony?

The Witness: Yes. I mean to say there was one thing——

Mr. Veeder (interposing): Very well, let us have it.

The Witness: In going through the deposits at the Empire Trust Company I found a deposit made on August 2, 1916, of $2500

Mr. Hughes: A deposit where?

The Witness: In the Guaranty Trust Company in my account I found a deposit on August 2, 1916, of $2,500, and I have been unable to find anything coming in to me at that date like coupons, or anything like that, which would amount to $2500 on or about that date. Further looking it down, I find that on or about that date there was a debit item in C. H. Cahan, Jr.'s, Empire Trust account. I thought that I was in honor bound to point that out, because the Empire Trust Company could readily trace through their books, no doubt, as to whether that may possibly have been a check drawn by C. H. Cahan, Jr., on his account and put into my account in the Guaranty Trust Company. It may be some other item, but I think that this may be the transaction, just looking at it on the surface. Check No. 387, of August 1st—— 290

Mr. Hughes (interposing): May I interrupt here? I just wish to interrupt long enough to say, your Honor, that the plaintiff, of course, contends that whether this went into the Guaranty Trust Company or not, whether this debit item of $2500 on the Empire Trust Company account is the same item that went into the Guaranty Trust Company account of the plaintiff is immaterial, and that in any event it would not be a set-off against the liability of the Empire Trust Company in this case; and we offer this explanation with that reservation of our legal rights. We felt, however, that while the plaintiff did not know one way or the other whether that was the same item that the 291

Mr. Hughes: That is all.

The Court: Is that your case?

Mr. Hughes: I think that is our case, except for the transcript of that account.

The Court: Then subject to the offering of the transcript of the other bank account in evidence and subject also to Judge Veeder's cross-examination is that the entire case?

Mr. Veeder: No, your Honor. We propose to offer something.

The Court: Then do you wish to wait until to-morrow and complete your cross-examination after examining these records?

299

Mr. Veeder: It will only take a very few moments, your Honor. We have the witnesses here, both of them.

The Court: Then go right ahead. Subject to the introduction in evidence of the bank account—the other transcript—the plaintiff rests?

Mr. Hughes: Yes, your Honor. Of course, if the defendant were going to carry over his evidence until to-morrow I would prefer to have the opportunity——

The Court (Interposing): We will treat the matter very informally. If you find over night some evidence you wish to introduce you may do so.

300

Mr. Hughes: I thank your Honor very much. Subject to that we rest.

PLAINTIFF RESTS.

301

DAVID C. BANKS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Allen.

Q. Mr. Banks, what is your occupation? A. Auditor, Empire Trust Company.

Q. How long have you been connected with the Empire Trust Company, about? A. Since March, 1913.

Q. And you have been auditor how long? A. For the past two years.

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Q. And prior to that what was your position? A. In charge of the auditing department without the title.

Q. They did not have a man of that title at that time? A. No.

Q. But you were in charge of that work? A. Yes.

Q. Now, have you produced here pursuant to subpoena and the notice to produce served by the plaintiff the deposit slips showing the deposit of twenty-one checks which have been offered here in evidence by the plaintiff and marked Plaintiff's Exhibit 5-A to——

Mr. Vedder (interposing): There are only twenty there.

303

Mr. Hughes: Yes.

Q. Yes; 5-A to 5-S, inclusive, together with a twenty-first check that was deposited on or about October 15, 1918, for $2400, making in all a total of twenty-one deposit slips? A. Yes.

Q. Are those the original deposit slips (handing papers to witness)? A. They are.

304 *David C. Banks—For Defendant—Direct.*

Q. And did those deposit slips accompany the various checks, Exhibits 5-A to 5-S, inclusive, and another check for $2400, as shown on the deposit slip of October 15, 1918? A. Yes.

Mr. Allen: I offer those deposit slips in evidence, and if there is no objection I would like to have the photostatic copies marked instead of the originals.

Mr. Hughes: I do not know that sufficient foundation has been laid for the offering of these. I do not understand that the witness has personal knowledge of them. I will re-
305 serve that for the cross-examination, however.

The Court: He produces these as the auditor, and presumably the person in charge of such matters, and from the files of the bank.

Mr. Allen: And he identifies them as the deposit slips relating to the checks which are in evidence.

Mr. Hughes: I will not object to their introduction and will reserve any matters as to the foundation for cross-examination.

Mr. Allen: May I have the copies marked?

The Court: There is no objection to hav-
306 ing the photostatic copies marked in lieu of the originals?

Mr. Hughes: Subject to correction.

The Court: Yes, of course.

Mr. Allen: I think they had better be marked, whatever the number is, with the letters after that, so that they will correspond.

The Clerk: We will have to mark them with the letters of the alphabet.

The Court: Then just reverse the order and say, for instance, A-1 instead of 1-A.

(Papers marked Defendant's Exhibits A, A-1 to A-20, inclusive.)

Q. I show you Plaintiff's Exhibit No. 11, Mr. Banks, which has been introduced here as a photostatic copy of transcript of the account of C. H. Cahan, Jr., with the Empire Trust Company, and reference has been made to certain entries thereon which purport to be under date of July 29, 1916, relating to a deposit of $5,000 and a withdrawal purporting to be on or about the same date of 308
$2,500, and I show you Plaintiff's Exhibt No. 5-A, being check No. 387, dated August 1, 1916, for $5,000, and a deposit slip dated August 2, 1916, for $5,000, Defendant's Exhibit A-19 (handing papers to witness). Will you tell us when that check, Plaintiff's Exhibit No. 5-A, for $5,000 was actually received at the Empire Trust Company as shown by the check and deposit slip? A. On August 2nd.

Q. 1916? A. 1916, yes.

Q. And was there any other check of that amount received to the credit of this account on July 29, 1916? A. No, sir.

Q. On Plaintiff's Exhibit No. 11 is there any date appearing showing the deposit of that $5,000? 309

Mr. Hughes: If your Honor please, on that I think that the transcript speaks for itself.

The Court: It may speak for itself, but he is asking the witness, I presume, to direct attention to any specific item. It is perfectly true that we must take it ourselves and peruse it and after some meditation arrive at some conclusion, but in the interest of

310 *David C. Banks—For Defendant—Direct.*

simplicity and as an aid to the Court I will overrule the objection. The witness can direct our attention to any item he finds.

Mr. Hughes: I doubt if that will result in promoting simplicity.

Q. Will you explain that entry of $5,000 and from the deposit slip and the check itself tell us what was the correct date of that entry? A. The entry should have been made on the ledger on August 2, 1916. The date appearing there is blank.

Q. There is no date opposite the entry of $5,000 on the credit side of that account? A. Not on the
311 ledger sheet.

Q. Not on the ledger sheet? A. No.

Q. But the deposit slip and the check itself shows that the check was received and credit given on August 2, 1916? A. Yes.

Q. Now, there is a debit entry on the ledger sheet, Plaintiff's Exhibit No. 11, for $2,500. Does any date appear on the ledger sheet as to when that debit entry was made? A. There is no date.

Q. Was there anything on the ledger to indicate when that $2,500 was paid? A. It was paid after we received the deposit of $5,000, which occurred on August 2nd.

Q. How do you determine that from the ledger?
312 A. Because the entry follows the $5,000 deposit.

Q. So that it was made on or after August 2nd? A. Yes.

Q. The date of the deposit of the $5,000? A. Yes, sir.

Mr. Allen: You may cross-examine, Mr. Hughes.

Cross-examination by Mr. Hughes.

Q. Do I understand that you testify as of your own knowledge whether that $2,500 came in after—or was paid out, rather, after the $5,000 came in? A. Well, from the exhibit shown, the ledger sheet——

Q. (Interposing) Is it invariable that transactions are entered in order—I mean by that is there never a time when a day will go by without a transaction being entered up? A. None that I know of, sir.

Q. What I mean is whether you do know it yourself—those entries in that ledger are not in your handwriting? A. No, they are not. 314

Q. Do you know in whose handwriting they are? A. I do not recognize the handwriting, no.

Q. Have you any knowledge of that transaction at all? A. Except from the deposit ticket.

Q. That is, you know from the deposit ticket that the $5,000 did not go in until August 2nd? A. Yes, sir.

Q. Have you any knowledge of your own as to when the $2,500 went out? A. No, sir.

Q. Then all your testimony means is, is it not, that if the books were kept correctly, assuming that whoever made that entry performed his duty in the way that he should have, the $2,500 would not be on the line below the $5,000 unless it had gone out subsequently? A. Yes, sir, that is correct. 315

Q. But whether the clerk who made the entry did perform his duty you do not know? A. No, sir, I do not.

Q. Speaking generally, through that account the fact that a date appears as July 29, 1916, there, ordinarily it means, does it not, that until a new

316 *David C. Banks—For Defendant—Cross.*

date is entered in the margin all the transactions have occurred on that date? A. It should, yes.

Q. Now, before we leave that account, it appears that this account of C. H. Cahan, Jr.'s, bore interest, does it not? A. Yes, sir.

Q. And that interest was from time to time credited upon that account to C. H. Cahan, Jr.? A. Well, the conditions are on a minimum balance of $1,000——

Q. (Interposing) That is, interest was payable on a minimum balance of $1,000? A. Yes.

Q. Now, was there any charge where the balance
317 fell below $500? A. I could not tell by the ledger sheet.

Q. Have there been any charges on the ledger sheet against the account by reason of its falling below $500, or below $100, as the case may be? A. There was one charge of April 28, 1916, of $1.

Q. What was the occasion for that charge? A. It is termed "banking privilege."

Q. What does "banking privilege" mean? A. That the account fell below a certain figure. What that figure was the ledger sheet does not tell.

Q. But it is the practice of your bank, is it not, to make a charge of $1 for any month where the account falls below $500? A. I would not say $500. It depends on the account itself—the activity and
318 the nature of the deposits.

Q. But that is one figure— A. Yes.

Q. And to make a larger charge of $2 where it falls below $100? A. Yes.

Q. That is a customary charge also? A. Yes.

Q. Now, will you go forward in that account and see whether you see any other debits against the account by reason of these customary charges or banking privilege charges? A. I find another one on July 27th, $1.

Q. 1916? A. Yes, sir. A further charge on October 30, 1916, of $1. Then November 29, 1916, $1. December 28, 1916, $1. April 27, 1917, $1. May 28, 1917, $1. June 28, 1917, $1. July 31, 1917, $1. September 27, 1917, $1. October 29, 1917, $2. November 28, 1917, $1. December 27, 1917, $2. March 29, 1918, $2. April 30, 1918, $2. November 27, 1918, $1. That is all I recognize.

Q. That is, as I understand it, if this account ran a balance of $1,000 or more it bore interest? A. Yes.

Q. And there are various credits of interest on this account? A. I have not noticed because it is very hard to distinguish interest on a photostat, because the interest appears on the original in red ink, and on a photographic copy it does not appear any different than an ordinary entry. 320

Q. But you can by briefly looking at that ascertain and testify, can you not, that there are credits of interest on the account?

The Court: I do not suppose anyone will contend that they do not appear on the photostatic copy in evidence. Can you tell us if that is the fact?

Mr. Hughes: I would not undertake to say so, your Honor. I would not want the Court to rely upon my statement, because I have not studied the account with enough care. 321

A. I find one credit of $1.92, representing interest to June 25, 1917, credited to the account on June 28, 1917.

Q. Then whether or not there are other credits, that one appears, anyway? A. Yes.

Q. And it appears that the account was an interest bearing account? A. Yes, sir.

Q. And if the account fell below certain figures, which you have not definitely in mind, these amounts that you have read are charged against it? A. Yes.

Q. Now, I show you a couple of letters dated, respectively—or what purport to be carbon copies of letters dated, respectively, June 25, 1919, and July 11, 1919, purporting to be signed by the assistant secretary, addressed to C. H. Cahan, Jr., in Montreal, and I ask you if those letters were sent to C. H. Cahan, Jr., on those dates (handing papers to witness)? A. Well, I could not testify
323 that they were or were not sent, because they were not——

Q. (Interposing) Not in your department? A. Well, it was sent by Mr. Hudson. His initials appear on the carbon copy. I believe they were sent.

Mr. Allen: We will concede that those are copies of letters sent to C. H. Cahan, Jr.

Mr. Hughes: And this one also (indicating)?

Mr. Allen: Yes, also one of August 4, 1919.

Mr. Hughes: I offer these in evidence.

(Papers marked, respectively, Plaintiff's Exhibits 19, 20 and 21.

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Q. Now, this first letter reads (reading Exhibit No. 19), and the second one, of July 11, 1919, says (reading Exhibit No. 20). Then I take it that under the practice of the Empire Trust Company, in addition to the requirements that if the account fell below a certain balance, there would be certain charges made in the account—if the account did not keep up to a certain balance the Empire Trust Company preferred not to have it at all in that case? A. Yes, sir.

325

Q. And these letters were written advising him that he could take it elsewhere? A. Yes, sir.

Q. Now, in regard to these deposit slips which you have identified, not everything that appears on these slips appeared on them at the time that C. H. Cahan, Jr., presented the funds for deposit to the Empire Trust Company, did it? A. No, sir.

Q. Will you tell me as to those what appeared on the slips at the time they were presented to the Empire Trust Company and what was written on by the officials of the Trust Company themselves? A. Do you want it as of all these?

Q. Yes.

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Mr. Allen: And give the date on each one and the exhibit number.

The Court: Yes. Just take the first one and say, "Deposit slip so and so and Exhibit number so and so," with the words and figures, whatever it may be, were put on by an officer or an employee of the defendant and not by the depositor, if that be the fact.

Mr. Vessler: Your Honor, it is quite apparent that we are going to run considerably over your hour for adjournment. It will be convenient so far as I am concerned to stop at any time.

The Court: Then we will recess now until to-morrow morning at 10.30.

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(Adjourned to Thursday, December 20, 1923, at 10.30 A. M.)

New York, December 20, 1923.

DAVID C. BANKS resumed the stand.

Cross-examination (continued) by Mr. Hughes.

Q. Mr. Banks, directing your attention again to the deposit and withdrawal which on this transcript of the account of C. H. Cahan, Jr., were apparently dated July 29, 1916, I would like to direct your attention to the withdrawal and ask you what the letters "Acc." in the margin of that account indicate (handing paper to witness)? A.
329 An acceptance or a certified check.

Q. That is, that was a check drawn by C. H. Cahan, Jr., on his account with you? A. Yes, sir.

Q. Which you certified? A. Yes.

Q. Or accepted? A. Yes.

Q. Have you any book of accounts in the Empire Trust Company showing on what date the acceptance was given—on what date that check was certified? A. Yes, sir.

Q. And have you that here? A. Yes, sir, I think so.

Q. Will you produce it? A. Yes.

(Book handed to the witness by Mr. Al-
330 len.)

The Witness: Here is the record, Mr. Hughes (exhibiting). I will show you the entry.

Q. That does not show the date? A. Yes, sir, at the top of the page it shows the date, "8/2."

Q. "8/2"? A. Yes.

Q. That indicates to you that that check was accepted or certified on August 2, 1916; is that correct? A. Yes, sir.

Q. Now, Mr. Banks, looking at Plaintiff's Exhibit No. 5-A, the check on the Bank of Montreal, No. 387, to the order of C. H. Cahan, Jr., for $5,000, it appears from the stamp on the back of that check that that was taken into the account on August 2nd, does it not (handing paper to witness)? A. Yes, sir, received by us on the 2nd.

Q. Then the deposit of this check, Plaintiff's Exhibit 5-A, and according to the record from which you have just testified, the withdrawal of $2,500 occurred on the same day? A. Yes.

Q. And do I understand your testimony of yesterday to be to the effect that the only thing on this 332
transcript of the account that indicates to your mind that the withdrawal was subsequent to the deposit is the fact that the withdrawal took place—I mean that the withdrawal is entered on a line following the entry of the deposit (handing papers to witness)? A. Yes, sir; the deposit was received first, and then a check paid against it, yes.

Q. But there is nothing in the records of the Empire Trust Company to show that the deposit was prior to the withdrawal except the fact that on this transcript of the account the withdrawal is entered on a line following the line on which the deposit is entered? A. That is all, yes.

Q. Now, directing your attention to a couple of other instances of the same general nature, I will 333
ask you to look at this account of date April 12, 1917 (handing paper to witness). A. Yes, sir.

Q. There appear on April 12th, do there not, a withdrawal in the sum of $456 and a deposit to the amount of $500? A. Yes, sir.

Q. Both on April 12, 1917? A. They are posted here as three items, one of $56 and one of $400 on the checks, and then a deposit—separate entries.

Q. I see. Separate entries? A. Yes.

Q. Now, having in mind the withdrawal of $56 and the balance in the account at the close of the preceding day, if the $500 deposit had not been made on April 12, 1917, the $400 withdrawal would have created an overdraft, would it not? A. The account would not be good for $400.

Q. That is, if that check had been paid? A. Yes.

Q. It would have created an overdraft? A. Yes.

Q. Again, is it the fact that the only thing in the records of the Empire Trust Company that indicates that the withdrawal was subsequent to the deposit is the fact that the withdrawal of $400 is
335 shown on the line subsequent to the deposit of $500? A. Yes, sir.

Q. Now, again, on May 26, 1917, at the close of business on May 24th there appears to have been a balance of $95.94, does there not? A. On May 24th, was that?

Q. At the close of business on May 24th. A. Yes, $95.94.

Q. Then on May 25th there was a deposit of $750? A. On the 26th.

Q. Yes, on the 26th. A. Yes, $750.

Q. $750? A. Yes.

Q. And a withdrawal of $210? A. Yes.

Q. Each on that day? A. Yes.

Q. And having in mind the balance on hand at
336 the close of the preceding day the withdrawal of $210, if paid, would have created an overdraft, except for the deposit of the $750 check? A. Yes.

Q. And, again, I take it, the records of the Empire Trust Company contain nothing to show that the withdrawal was in fact subsequent to the deposit, except that it appears on a subsequent line of the transcript? A. Unless I refer to the deposit ticket for a mail deposit. That would show.

Q. Well, I will show you the deposit ticket. A. That is May 26th.

Q. Does that indicate a mail deposit (handing Defendant's Exhibit A-6 to witness)? A. No, sir.

Q. Now, one more instance: On December 9, 1915, there was a withdrawal of $550 and a deposit of $488.19, was there not, both on that day (handing paper to witness)? A. Yes, sir.

Q. And in that case the withdrawal is on the line preceding the deposit? A. Yes, sir, it is.

Q. So that in your original records an overdraft is indicated by a red figure in the third column of $433.37, is there not? A. During a part of the day, yes. 338

Q. Yes. And, again, so far as the records of the Empire Trust Company show the fact that the credit is on the line subsequent to the debit indicates that the credit occurred after the debit, and so for a part of that day at least there was an overdraft; is that the fact? A. Not necessarily. The deposit, while posted at that time, probably was in before the check was paid.

Q. Why "probably"? A. Because of the system of posting the deposits. Deposits are posted after we post our exchanges—exchanges being the Clearing House items. They arrive at the bank shortly before 11 o'clock and they are then posted within an hour or an hour and a half, and after that the credits or deposits are posted. 339

Q. Well, then, what is the significance of the line on which the entries are made? That is, as I understand it, your testimony that there was no overdraft in these three other cases that I have stated rests entirely on the fact that the deposit is shown on the line preceding the withdrawal? A. Yes.

Q. Now, if that system which your testimony indicates means anything, does it not mean that when

the deposit is on a line succeeding the withdrawal that there has been a period there where there was no deposit to meet the withdrawal, and does not the fact that the $433.37 in the third column appears in red figures indicate that there was, in fact, a shortage in the account at that time? A. No; it tends to show that the check was an exchange check presented through the Clearing House, and there might have been a deposit in the bank at the time, but which was not posted until the regular deposit tickets were posted—the regular hour for posting.

341 Q. Well, you have no personal knowledge that that was the fact? A. No.

Q. That is a mere conjecture? A. That is the system in the bank.

Q. But you have no knowledge that this was an exchange item? A. No.

Q. You have no way of knowing what that was? A. No.

Q. And from the system to which you previously testified, the fact that a credit was on a line subsequent to a withdrawal would ordinarily mean that the credit was subsequent to the withdrawal, would it not? A. The posting, but not in receiving. It might not mean in receiving——

342 Q. (Interposing:) Then, going back to the other three instances of which you have said that you were able to testify that the credit was prior to the withdrawal because it appeared on a prior line, is it not also, in view of your most recent testimony, the fact that you cannot tell as to that which took place actually first, but that simply indicates which was posted first? A. Well, we post credits at a certain hour during the day, and it is always after 12 o'clock, and a credit is posted before a debit is

posted. That would show that a check had been presented after the credit was received.

Q. What do you mean by the credit being received? A. The deposit ticket.

Q. The deposit ticket being received? A. Yes; credit and debit in the terms of the bank—credit being a deposit and debit being check drawing.

Q. But you do not think that same system would enable you to testify that in this 1915 instance the credit was after the withdrawal? A. No, I could not so testify.

Q. That is, you could not testify one way or the other about that? A. No, sir.

Q. Now, I will ask you to look at the entry of 344
September 1, 1916, and first ask you what the balance at the close of business on August 30th, which is the day prior to September 1st, so far as there are any entries of dates on this transcript, was (handing paper to witness)? A. The balance on August 30, 1916, was $147.47.

Q. Then what happened on September 1st? A. There was a credit of $2,000 and a charge or check of $300, leaving a balance of $1,847.47.

Q. And in that case you speak of the deposit first. As a matter of fact, they appear on the same line, do they not? A. On the same line, yes.

Q. So that there is nothing in the record there to show which was the first? A. No, sir. 345

Q. And if it should be that the withdrawal was prior to the credit that $300 withdrawal would have created an overdraft, would it not? A. Yes, sir.

Q. Now, having in mind your former testimony, that in the other cases to which I have called your attention the fact that the deposit appeared on the line prior to the withdrawal indicated that the deposit was first, would not this entry in which they

both appeared on the same line indicate that they were—if it indicates anything, indicates that they were contemporaneous? A. I could not tell, because it is the last line of posting on the ledger sheet, and there is no way of telling from the record as to which was received first, because the bookkeeper instead of bringing his balance over on the next sheet just used a short cut and posted both entries on the one line.

Q. Now, is it the practice as soon as a check comes through for payment against the account, or a deposit comes through to the credit of the ac-
347 count, for the bookkeeper, as you have called him, to immediately make an entry in the book of that transaction? A. No, sir.

Q. When, with respect to a receipt of a deposit or the making of a charge against the account is the posting on the book made? A. The check is received in the Clearing House and posted first. Then——

Q. (Interposing) Now, checks received from the Clearing House— A. (Interposing) That is commonly called "exchanges."

Q. What are those, deposits or withdrawals? A. No, checks; checks paid against customer's account, or received for payment against the customer's ac-
348 count, and they are paid first and entered in the ledger first. Then the deposits are entered in the ledger.

Q. Is that done by different clerks? A. No, one bookkeeper posts on his own individual ledger.

Q. Now, let me ask you this: Is the book of which—I have been informed that Plaintiff's Exhibit No. 11 is a photostatic copy—is that the book of original entry? A. Yes, sir.

Q. There is no other book in which these deposits and charges are first entered and then entered into this? A. This book to which you are referring is called a debit and credit book. As a general rule it is entered by the junior clerks—the machine runs, as you see in here, for the matter of proving in this book, and it is posted then on the ledger books.

Mr. Allen: May we have that book marked for identification now, your Honor, so that we will know what he is referring to?

The Court: Yes.

(Book marked Defendant's Exhibit B for 350
Identification.)

Mr. Hughes: Do you want the whole book marked, Mr. Allen?

Mr. Allen: Yes, and then we will point out those parts afterwards.

By Mr. Hughes.

Q. In this book which has been marked Defendant's Exhibit B for Identification are there entries of all checks and not merely the certified checks? A. All checks.

Q. All checks? A. Yes, for the day's work.

Q. This apparently is kept alphabetically? A. 351
Yes, sir.

Q. Then are the entries in this book made prior to their posting in the book of which Plaintiff's Exhibit No. 11 is a photostatic copy? A. Yes.

Q. Then the entries in this book, Defendant's Exhibit B for Identification, being alphabetical, these are not made contemporaneously with the transactions—that is, they are all done at the end of the day? A. No; those are done at the time that

the checks are sent to our bookkeeping department.

Q. Well, how do you get them alphabetically? A. The clerks arrange the checks in alphabetical order, according to ledgers, before posting them on the ledgers.

Q. Well, is this the book in which the entries are physically made for the first time? A. Usually, yes, sir.

Q. I am still unable to see where these items run right along without any appreciable gap between one and the other; how it will be possible to get them in alphabetical order if they were made contemporaneously with the checks coming in or the
353 checks going out. It must be done all together at some subsequent time. A. If you will notice in the accounts there you will see on that ledger—the A to E ledger—there are probably two or three different lots posted, running from A to E, and then at a later part of the day starting over again.

Q. At any rate, entries are not made in this book, which I understand is the first book on which any entry is made— A. (Interposing) Yes.

Q. (Continuing) —as soon as the charge or credit comes through—there is some appreciable time that elapses, and then a lot of them are taken up and entered alphabetically together? A. Yes.

Q. That is, it may be done at various intervals
354 through the day? A. Yes.

Q. But it is done with a bunch of checks all at one time? A. Yes, sir.

Q. Rather than being absolutely chronological when a particular check comes in? A. Yes.

Q. Then the entry is made on the book of which Plaintiff's Exhibit No. 11 is supposed to be a copy after all these entries have been made; is not that so? A. Not all.

Q. Well, for a particular day? A. No.

Q. Is this book being made up concurrently with Defendant's Exhibit B for Identification? A. Yes, sir; as the different lots of checks or deposits which are entered in this book——

Mr. Allen (Interposing) Defendant's Exhibit B for Identification?

The Witness: Yes; they are posted onto the ledger.

Q. As a substantially concurrent matter, or do they not wait until several blocks of entries in Defendant's Exhibit B for Identification have been made and then enter them in the book, Plaintiff's 356
Exhibit No. 11? A. No, sir; they are posted practically at the same time as this exhibit here (indicating).

Mr. Allen: Defendant's Exhibit B for Identification?

The Witness: Yes.

Q. And that takes place at intervals after a sufficient number of checks have come through to make it convenient to enter them all up at once? A. Yes, sir.

Q. So that when entries are made on the same day in the book of which Plaintiff's Exhibit No. 11 is a copy, and on that day there has been both a 357
charge and a credit, to the account, in view of the system of entries which you have just described, it is, as a practical matter, impossible to say with any certainty whether the charge or the credit came first, is it not? A. I could not tell on individual items.

Q. On any individual item? A. No, sir.

Q. And in view of the system of the entry of these matters in the books, the fact that they are

not made immediately after the transaction, but a block of several are collected and all entered at the same time regardless of the chronology, the fact that a credit appears on a line preceding a debit is not of very much significance, is it? A. Yes, sir, it is to me, because in the system it shows that it was received—the deposit was received and posted before the check was received and posted by the bookkeeper.

Q. Posted, yes, but when the transaction happened it does not show at all, does it? A. No, sir.

Q. And, in fact, if there had been a charge and a credit on the same day, and if, in fact, the charge had preceded the credit, would it not, even so, have been natural for a bookkeeper entering the two transactions at the same time to put the credit ahead of the charge, so that the account would not show an apparent overdraft? A. No, sir.

Q. It would not? A. No, sir. The system is that if they are posting charges or checks they will complete those entries before they will post the deposit tickets or credits.

Q. Do they not do it at the same time? A. No, sir; checks and deposits are not posted at the same time.

Q. Now, coming back to this item of September 1st, in which they appear on the same line, you think those two entries were not made at the same time there? A. No, sir.

Q. That does not indicate to you that the charge and the credit were contemporaneous? A. No, sir.

Q. In fact, it does not indicate anything—you cannot tell which was first? A. No, I could not tell from the entries.

Q. Now, looking at these checks, Plaintiff's Exhibits Nos. 5 to 58, inclusive, and the deposit

tickets, Defendant's Exhibits A to A-20, inclusive, these checks were entered on your book, of which Plaintiff's Exhibit No. 11, is a copy, on the day when they were handed in to the bank—to your bank—with a deposit ticket, were they not? A. The checks would not be entered by us; they are on another bank.

Q. I mean the credit. A. Yes, sir, the credit.

Q. I mean the credit would be entered on the day when the check and the deposit ticket were received by the Empire Trust Company? A. Yes, sir.

Q. As matter of fact, the Empire Trust Company did not receive the proceeds of those checks until the next day, did they? A. Clearing House items, you mean? 362

Q. Yes. A. The next day on the Clearing House items, yes.

Q. Well, these are all Clearing House items, are they not, Plaintiff's Exhibits Nos. 5 to 5-8, inclusive (handing papers to witness)? A. Yes, sir.

Q. So that in each case we may take it that when a deposit ticket bears a certain date and an entry is made in this account, Plaintiff's Exhibit No. 11, that so far as these twenty checks are concerned the Empire Trust Company did not actually receive the funds until the day succeeding the date of the deposit ticket and the date on which the credit is printed on Plaintiff's Exhibit No. 11? A. Well, the checks as deposited by the Empire Trust Company in their depositary, the Hanover National Bank, are credited to our account when we deposit them. The funds through the Clearing House are cleared the following day. 363

Q. And that is when the Empire Trust Company actually receives the funds? A. No, sir; the Empire Trust Company deposits them in another bank

for clearing. We are not a member of the Clearing House.

Q. No, and you clear through the Hanover National Bank? A. Yes.

Q. And the Hanover National Bank may credit you on the day of the deposit? A. Yes.

Q. But if anything happens to the check, so that the Hanover National Bank does not get it, then you are liable to the Hanover National Bank? A. Returned the next business day.

Q. So that not until the Hanover National Bank receives the funds through the Clearing House has the Empire Trust Company clearly control of the
365 funds represented by the check so deposited? A. No, sir.

Q. This stamp that appears on all of these checks, to the order of Hanover National Bank, signed "Empire Trust Company," and then, "Received payment through New York Clearing House," with the date, that is stamped the day of the deposit, is it not? A. Yes, sir.

Q. That does not indicate when the funds actually came through the Clearing House? A. Well, that is the Clearing House system. For instance, this morning's clearings at 10 o'clock is the work of the previous day.

Q. Yes, but this stamp is on the day when it is
366 sent in for clearing? A. Yes.

Q. Rather than the day when it is cleared? A. When we receive the check.

Q. When you receive the check? A. Yes.

Q. I want to just call your attention to certain initials or matter on the backs of four of these checks and ask you whether you know what they mean or whom they refer to. Plaintiff's Exhibit No. 54, which is to the order of Empire Trust Com-

pany, on the back appears the rubber stamp endorsement, "Credit account of (blank) with Empire Trust Company," and then written in, "C. H. Cahan, Jr." Do you recognize that handwriting—do you know whose it is (handing paper to witness)? A. Yes, sir.

Q. Whose is it? A. That was our receiving teller at that time.

Q. I see. And those initials underneath? — A. (Interposing) Are the initials of that receiving teller.

Q. They are his initials? A. Yes, sir.

Q. And is the same thing true with respect to the ink part of the endorsement for deposit on the back of Plaintiff's Exhibit No. 5-D, a check of September 30, 1916, to the order of Empire Trust Company (handing paper to witness)? A. Yes, sir, the same person. 368

Q. That is written in by your receiving teller? A. Yes, sir.

Q. Now, the endorsement for deposit on the back of Plaintiff's Exhibit 5-I, which is in handwriting, does that mean anything to you at all (handing paper to witness)? A. No, sir.

Q. Was that written by anybody connected with the bank, so far as you know? A. No, sir.

Q. Do you recognize these initials as the initials of anybody connected with the bank? A. "Per. . .."? 369

Q. Yes. A. I do not recognize them.

Q. Now, on Plaintiff's Exhibit 5-P, under the endorsement, "C. H. Cahan, Jr.," appears "Harry A. Peck." Does "Harry A. Peck" mean anything to you at all—have you ever had any contact with such a person? A. I do not know him.

Q. Do you know whether he was at any time connected with the Empire Trust Company? A. Not to my knowledge.

Q. What are the initials which are scrawled apparently over the endorsement of "Harry A. Peck"—or are they initials? A. To me they look more like a cancellation—just drawing a waved line through the name.

Q. I see. Mr. Banks, has the Empire Trust Company now any of the canceled vouchers of C. H. Cahan, Jr.? A. Not to my knowledge, no, sir.

Q. Has the Trust Company made a search for them? A. Not a specific search, no, sir, but the system is that any and all old vouchers for which we have an address are forwarded by registered mail at least three times during the year.

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Q. And according to your best information and belief the Empire Trust Company has none of those canceled checks now? A. No, sir, we do not.

Q. Now, has the Empire Trust Company any book or any record of any kind which would indicate the names of the payees of any of the checks which C. H. Cahan, Jr., drew on his account? A. No, sir, we do not know. The only exception might have been on certified checks.

Q. Mr. Banks, on these deposit tickets, Defendant's Exhibits A to A 20, inclusive, I want to briefly identify the things on these tickets that are written in by the employees of the Empire Trust Company. On Defendant's Exhibit A 20 the deposit

372 ticket of July 12, 1916, I understand that these initials "C. C." and the "S" with a ring around it are written in by the employees of the Trust Company, are they not? A. And, in addition, the rubber stamp date, July 12th.

Q. The rubber stamp date, July 12th? A. Yes.

Mr. Allen: May I have it indicated that the rubber stamp date is a date towards the bottom of the ticket?

The Witness: Yes.

Mr. Allen: Rather than towards the top.

The Witness: Yes, not the date of the ticket.

By Mr. Hughes.

Q. Then may we take it with regard to all of these deposit tickets that the figure with a circle around it—which indicates the bank on which the check was drawn, does it not? A. Yes, sir.

Q. (Continuing) That that figure as to all of these tickets, the figure with the ring around it, and the rubber stamp of the dates appearing at or near the bottom of the ticket, are inserted by the 374
Trust Company? A. Well, it would not necessarily need to have a ring around it. That just means it is another bank clearing through a third bank.

Q. But the figure, anyway? A. The figure is an indication of the paying bank.

Q. Now, on this deposit ticket of August 2nd, Plaintiff's Exhibit A-19, who wrote on the word "accepted" there? A. Our receiving teller.

Q. And what is the "O.K" with initials? A. O.K. of an officer of the Empire Trust Company.

Q. And who is that officer? A. Mr. Lyon.

Q. Is he in court? A. Yes, sir.

Q. On the slip of September 1st, Defendant's Exhibit A-18, who wrote the word "certified"? A. 375
Well, there are two words "certified" on that. The larger writing toward the bottom is our receiving teller's.

Q. And is the same thing true—that is, that the writing is of your receiving teller—in regard to the word "certified" on Defendant's Exhibit A-17? A. Yes, sir.

Q. And A-16? A. Yes, sir.

Q. And the word, or abbreviation, "Cert.," on A-15? A. Yes.

Q. And the words, "C. C., Agents Bank of Montreal," on A-14? A. Yes, sir.

Q. And with regard to the "C. C.," that means "certified check," does it not? A. Yes, sir.

Q. On Defendant's Exhibit A-13? A. Yes, sir.

Q. And the same initials on Defendant's Exhibit A-12? A. Yes, sir.

Q. And on A-11? A. Yes, sir.

Q. And on A-10? A. Yes, sir.

Q. Now, on Defendant's Exhibit A-9, is there any writing on that deposit ticket in the handwriting of an agent of the Empire Trust Company (handing paper to witness)?

377 A. Yes, sir.

Q. What is that? A. "Own check, cert. on 107."

Q. Do you know whose handwriting that is in? A. Yes, sir; a former receiving teller, who has since died.

Q. Who has since died? A. Yes, sir.

Q. And the letters "C. C.," or the initials "C. C.," on Defendant's Exhibit A-8 is also the handwriting of your receiving teller? A. Yes, sir.

Q. And the same thing as to the "C. C." on A-7? A. Yes, sir.

Q. And on A-6? A. Yes, sir.

Q. And on A-5? A. "C. C. 107."

Q. But the "certfd" is not? A. No, sir.

Q. And also the "C. C." on A-4? A. Yes, sir.

378 Q. And what does this "5" with a ring around it down in the middle of the slip mean? A. That is an interest term.

Q. I see. And the "C. C." on A-3? A. Yes, sir.

Q. Now, with regard to the deposit ticket of September 1, 1917, Defendant's Exhibit A-2, in whose handwriting is all of that deposit ticket (handing paper to witness)? A. A former receiving teller, who has since died.

Q. Who has since died? A. Yes.

Q. And including the name "C. H. Cahan, Jr."? A. Yes, sir.

Q. And that apparently was an item that was received by mail, was it not? A. Yes, sir.

Q. And that notation reads, "For account of C. H. Cahan, Jr., check of C. H. Cahan on Bank of Montreal, New York City, $500"? A. Yes, sir.

Q. In whose handwriting is all of the deposit ticket, Defendant's Exhibit A-1 (handing paper to witness)? A. It appears to be one of our receiving tellers.

Q. Including the name "C. H. Cahan, Jr."? A. Yes, sir.

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Q. So that also apparently was a deposit received by mail? A. Yes, sir.

Q. Now, in regard to Defendant's Exhibit A, the deposit slip of October 15, 1918, what can you tell me as to the writing on that? A. "C. C. 107" was written by our receiving teller, and also rubber stamp right along side of the amount, October 15, 1918.

Q. And in that case the name "C. H. Cahan, Jr.," is apparently a rubber stamp, is it not? A. Yes, sir.

Q. And is there anything to indicate as to this Defendant's Exhibit A one way or the other whether it was a personal deposit or a deposit by mail? A. A personal deposit.

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Q. You think it was? A. Yes, sir.

Q. I call attention to the defendant's answer, paragraph eleven, that these checks, with certain exceptions, were all accepted or certified before they were handed in to the Empire Trust Company for deposit. Is there anything on these checks that would indicate that the certification was prior to the acceptance for deposit? A. Nothing on the checks, no, sir.

Q. What is there, if anything, that would indicate that to you? A. In a few cases your deposits show——

Q. (Interposing) That is, in a few cases there is the word "certified" or "certfd"? A. Yes, sir.

Q. Written in a handwriting other than a handwriting of an agent of the bank? A. Yes, sir.

Q. And that is true as to Defendant's Exhibits A-20, A-18, A-14? A. Yes, sir.

Q. A-5? A. Yes, sir.

Q. Except for those instances just detailed there is nothing on the deposit ticket to show that it was
383 certified at the time it was presented for deposit? A. Not on the deposit ticket, no, sir.

Q. Is there anything anywhere else, except for that deposit ticket, to indicate that? A. The custom of the bank.

Mr. Hughes: I ask that that be stricken out.

Mr. Allen: I submit that is perfectly responsive—"is there anything else?"

The Court: Yes, I think that is responsive to the question.

Mr. Hughes: May I have an exception?

The Court: Yes.

By Mr. Hughes.

384 Q. Do you mean that the bank never sends checks to be certified itself? A. Not for a customer.

Q. Well, suppose in an instance where there was a withdrawal the same day and the withdrawal could not go through without an overdraft unless the check that was coming in was good, might not the bank in that case have it certified itself? A. I believe not. They would not honor the check if the deposit was not good funds.

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Q. Do you mean that the bank would never, to avoid dishonoring a check, send the deposited check to be certified, to see whether there was the amount there to pay it or not? A. I could not say that they would never, but not to my knowledge.

The Court: You sometimes hold a check, do you not—a customer's check—until a deposited check has gone through the Clearing House?

The Witness: On a Clearing House item, yes, because I do not have to give to the check any settlement until about 2.30, and we have until 3 o'clock to return the check.

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The Court: Instead of honoring the depositor's check—the customer's check at once—you simply defer its payment until you have heard from the Clearing House?

The Witness: Until a deposit is made, you mean?

The Court: Yes.

The Witness: Yes, sir.

Q. But the dates in this transcript, Plaintiff's Exhibit No. 11, on which a debited item appears, is the actual date when the charge was made rather than the date when the check was received, is it not? A. I do not get you on that.

387

Q. Well, when a debit appears here—we will take an arbitrary date—when a debit appears against the account of C. H. Cahan, Jr., say, on March 14, 1916, that is the date when his account was charged and the check of withdrawal on his account is honored, and not the date when that check of withdrawal appears at the bank? A. That would be the same day.

388 *David C. Banks—For Defendant—Cross.*

Q. Well, unless, under his Honor's suggestion, the check had been held? A. It could not be held over the day.

Q. It could not be held over the day? A. No.

Q. Now, in the answer of the Empire Trust Company in this action in paragraph eleven, it is alleged that the plaintiff was never a depositor with the defendant, but that the defendant did know that the Guaranty Trust Company of New York was the depository bank of the plaintiff, and that the authority or power of attorney said C. H. Cahan, Jr., to act was lodged with the Guaranty Trust Company,
389 and that the same is true with respect to the checks drawn on or certified or accepted by the agents of the Bank of Montreal. Do you know, Mr. Banks, how the Empire Trust Company knew that?

Mr. Allen: I object to that as incompetent, irrelevant and immaterial. How can this witness testify as to whoever verified that complaint, what his knowledge was?

Mr. Hughes: I am asking him if he knows. The answer stated that the Empire Trust Company knew. I would like to find out how they knew.

The Court: Well, he may answer it yes or no.

390 Q. Do you know how the Empire Trust Company knew that? A. No, sir.

Mr. Hughes: No further cross-examination.

Mr. Veeder: Now, your Honor, this is Mr. MacKenzie, counsel for the Guaranty Trust Company, and I understand that he will state to the Court that the twenty-first check that we haven't got, alleged in the complaint,

was certified, and that on that statement Mr. Hughes is prepared to concede,—what?

Mr. Hughes: I am prepared to concede, in the interest of saving time and to obviate the necessity of calling the witness, that the proper representative of the Guaranty Trust Company could be called and would testify to that effect.

Mr. Veeder: You do state that, Mr. MacKenzie?

Mr. MacKenzie: Yes, I state that I have caused inquiry to be made as to whether a check, dated the 15th of October, 1918, for $2,400, was certified, and I was informed, after inquiry, that it appeared that that check was certified. 392

The Court: Very well.

Mr. Hughes: May I ask, also, Mr. MacKenzie, for the record, whether there is any record in the Guaranty Trust Company to show whether that check of $2,400 was payable to the order of the Empire Trust Company, or to the order of C. H. Cahan, Jr.?

Mr. MacKenzie: I am told that there is no such record.

The Court: Very well. We will take it that the witness would so testify if called.

Mr. Hughes: Yes. 393

Redirect examination by Mr. Allen.

Q. Mr. Banks, in answer to Mr. Hughes' question to you, whether there was anything on the deposit slips, Defendant's Exhibits A to A 20, or the checks, Plaintiff's Exhibits 5 to 5-8 inclusive, which indicated that these checks were certified at the time of presentation, except on certain four or

394 *David C. Banks—For Defendant—Redirect.*

five checks mentioned, you stated there was nothing, but that there was a custom of the bank that showed that they were certified at the time of presentation. Will you explain just what that custom was?

Mr. Hughes: I object to that, if your Honor please, any evidence of what the custom was. The answer referring to a custom was left in as responsive to my question, but no question of mine opened the door to any proof of custom.

Mr. Allen: I think it did, when he asked him, "Anything else." That is certainly a
395 broad question, and if he answered with a statement about the custom, I think it is competent to explain it.

The Court: Did not the witness testify to some custom or usage?

Mr. Hughes: He did, and your Honor allowed it to stay in.

The Court: Well, I think I will allow it. As I have said before, with a jury of one—which is, in reality, without a jury—I will take it subject to its being related or connected.

The Witness: What is your question, Mr. Allen?

396 *By Mr. Allen.*

Q. You said there was nothing on these checks or deposit slips, except in those four or five instances enumerated, to show that the check was certified at the time of presentation? A. Yes, sir.

Q. And Mr. Hughes then asked you what was there to show that they had been certified at the time of presentation, if there was anything else that would show it, and you said a custom. Now, what

is that custom? A. It is not the custom of the banker to send out customers' checks for certification, as we would request the customers to have them certified before presenting them.

Q. And according to that custom all of these checks which are marked here "certified," were certified before or at the time of presentation? A. Yes, sir, I believe so.

Mr. Hughes: I object to that as a conclusion. The inquiry was simply how he knew——

The Court: Yes, the Court understands.

398

Q. Now, you have referred to a certain book which has been marked Defendant's Exhibit B for Identification, upon the inquiry of Mr. Hughes as to whether there was any other record showing the withdrawal of $2,500 on or about August 2nd as indicated by a transcript of account, Plaintiff's Exhibit No. 11. What is that book, Defendant's Exhibit B? A. That book is a record of all the checks paid during the current day's business, and all deposits received during the same day.

Q. Has it a name? A. We call it the debit and credit book.

Q. Does more than one clerk or bookkeeper work upon that book? A. It is the junior clerks that type this book on machines. 399

Q. Now, in that book, Defendant's Exhibit B for Identification, you were asked by Mr. Hughes to point out any entry with relation to the withdrawal of $2,500 from the account of C. H. Cahan, Jr., on or about August or the latter part of July or the 1st of August, and you identified a page? A. Yes, sir.

Q. Will you pick that out for me now? A. Yes (handing book to Mr. Allen).

Q. And the date on that page is August 2, 1916, after which follows the words "Sheet 4"? A. Yes.

Mr. Allen: I offer that page in evidence.

Mr. Hughes: If your Honor please, I assume that the purpose of this offer is to prove the entry of debits, among them the "C. H. Cahan," as it is here, $2,500. In view of Mr. Cahan's testimony—in view of the plaintiff's testimony yesterday in which he volunteered the information that there might be such a thing, though he did not know one way or the other, the plaintiff does not desire
401 to urge the objection which it might otherwise urge to the competency of this book; that is, we are perfectly willing that the fact, if it is a fact, should come out. I do desire to urge an objection on the ground of immateriality and irrelevancy; that whether or not this went out does not furnish any set off to the defendant in this case.

(Page marked Defendant's Exhibit C.)

Q. In making up this debit and credit book, the white sheets are used for the debits, and what shall we call it yellow? A. Buff.

Q. The buff sheets used for the credits, is that correct? A. Yes.

402 Q. Now, I notice on the page, Defendant's Exhibit C, that there are apparently different sets of entries running alphabetically from A to E. Will you explain how those different sets of entries on the same page, running alphabetically from A to E, would occur, rather than to be continuous—a continuous page, A to E? A. It is the method in which the checks are sent to our bookkeeping department by our tellers. The different runs of

checks are forwarded to the bookkeepers, and then sorted alphabetically, and according to ledgers, and then run by the debit and credit, and then given to the bookkeeper for posting.

Q. What do you mean by the different runs of checks? A. Machine runs or lists of checks.

Q. And different clerks or juniors take care of different ledgers, is that correct? A. Yes.

Q. And then different clerks make the entries from time to time on this particular book, Defendant's Exhibit B, or does one clerk handle all of the entries relating to depositors whose names commence with the letters of the alphabet from A to E? A. Usually one junior clerk would handle two or 404 three ledgers.

Q. Now, would the fact that this entry of C. H. Cahan, $2,500 on Sheet 4—would the fact that it appeared on Sheet 4, which is next to the last sheet of that day's debit entries, indicate that the debit was made early or late in the day? A. It would seem to indicate that it was a late item—not in the morning exchanges.

Q. Now, in this same book, Defendant's Exhibit B, is there any entry showing a credit to the account of C. H. Cahan, Jr., on August 2nd, of a deposit of $5,000—a check of $5,000 (handing book to witness)? A. Yes, sir, there is a deposit on August 2nd of $5,000 "C. H. Cahan." The "Jr." has been omit- 405 ted in the description.

Mr. Allen: I offer that in evidence (handing book to Mr. Hughes).

Mr. Hughes: That is all right.

(Marked Defendant's Exhibit D.)

By Mr. Allen.

Q. This sheet, Exhibit D, being headed, "Credits A to E," 8/2/16, Sheet 1, is a credit sheet for the 2nd of August, 1916? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Now, taking into consideration Defendant's Exhibits C and D in the book, Defendant's Exhibit B for Identification, and the entries on Plaintiff's Exhibit No. 11, appearing without any date in the first column, but between the entry of July 29th and August 3rd, can you state whether or not the entries on that transcript relate to these particular items,
407 Exhibits C and D, which you have just referred to? A. Yes, sir, the deposit of $5,000 without date should have been headed or dated August 2nd, and the withdrawal or debit of $2,500 should likewise have been August 2nd,—an error on the part of the bookkeeper.

Q. In examining you upon this transcript of the account of C. H. Cahan, Jr., Plaintiff's Exhibit No. 11, I believe a reference was made to a certain red ink entry—I believe Mr. Hughes spoke of the fact that the original record showed one entry in red ink.

Mr. Hughes: Yes.

408 Q. The photostatic copy would not show the red ink?

The Witness: No, sir, it would not.

Q. That is correct, is it? A. Yes.

Q. But that entry is marked?

Mr. Hughes: I put a red ring around it.

Mr. Allen: Yes.

Q. That entry is marked on Plaintiff's Exhibit No. 11 with this red ring, is that correct? A. Yes, sir.

Q. Now, you have examined the original books, the ledger account, of which Plaintiff's Exhibit No. 11 is a photostatic copy, have you? A. Yes, sir.

Q. Was there any other red ink entry in that account, except this one of December 9th for $433.37? A. There is none other.

Q. Now, will you explain in the system which was in vogue, what a red ink entry in a ledger account means? A. It should mean an overdraft at the close of a day's business.

Q. And if there is no red ink entries in the account, other than this one which you have just referred to, and which we will take up in a minute, would that indicate that there was no overdraft in that account? 410

Mr. Hughes: I object to that, if your Honor please, as incompetent, irrelevant and immaterial. The witness has answered at length with regard to these matters, and the conclusion as to whether there was an overdraft will have to rest on his testimony of the facts.

The Court: I will overrule the objection.

Mr. Hughes: Exception, if your Honor please. 411

The Court: Yes. Of course, it does not prove that there was not an overdraft. It merely indicates that according to the custom of the bank there was no overdraft. Of course, that is not conclusive of the fact; it is his conclusion based upon a custom or usage of the bank's.

Mr. Hughes: I will note my exception.

The Court: Yes. I do not think the Court will be swayed about any evidence about which there might be any question; I hope not, at any rate.

Mr. Allen: Will you read the question, please?

(Question read.)

The Witness: It was.

Q. Now, will you explain just what the system is and was at that time in the bank of entering checks, either credits or debits, in the account from the time the bank opens in the morning? A. The morn-
413 ing Clearing House items or exchanges are received by us from approximately 10:30 to 11 o'clock, and sorted after proving to see that the correct amount is being paid to the clearing House. Then the bookkeepers and assistants sort them alphabetically, and according to ledgers, for posting into the debit and credit book, and from there to the ledgers—respective ledgers.

Q. By "debit and credit book," you mean a book of the same character as Defendant's Exhibit B? A. Yes, sir. Those exchanges or Clearing House items are posted first, and the receiving teller at about 12 o'clock, or shortly thereafter, will send up all the deposit tickets which have been received dur-
414 ing the morning for posting as soon as the bookkeepers have finished posting the exchanges or Clearing House items.

Q. In other words, the deposit items are not sent up to the bookkeeping department for posting until the bookkeeping department has finished with posting the Clearing House items? A. Yes.

Q. And that usually is noontime or shortly thereafter? A. Yes. It is timed so that they will have the deposit tickets for reference as to deposits for

an account, if needed by the bookkeeper, and have them ready for immediate posting after the slips of the morning clearings have been posted. Then after the deposits are posted, the cash items of the tellers and also, later, the deposits of the receiving tellers, are sent to the bookkeeping department for posting.

Q. Now, are the deposits which come in during the day sent up from time to time as they accumulate? A. In different blocks, as we call them. We close them at intervals, and then the receiving tellers on the deposits will forward a block or run of deposit tickets to the bookkeeping department.

Q. In other words, they do not hold them all until 2 or 2.30 o'clock and send them all at once? A. 416
Never.

Q. Now, in the event that a bookkeeper finds that when he is posting the entry which he has made—a charge entry—that it overdraws the account, what, if any, notation would he make, or would he put that in red ink? A. He would refer to the credit or deposit ticket to see if the check was good for payment, and if it was good, showing that it had a deposit to cover that amount, he would post the item and bring out his balance in red ink, if it showed an overdraft.

Q. Yes. A. And then at a later time when he was posting the rest of his credits, that balance would be covered by the deposit being credited to the ac- 417
count.

Q. Now, in these instances to which Mr. Hughes referred, on Plaintiff's Exhibit No. 11—I think I got the dates correctly—April 12, 1917, May 26, 1917, September 1, 1916——

Mr. Hughes: Right.

Q. (Continuing) Is there any entry in the books as shown here by Plaintiff's Exhibit No. 11, that

there was an overdraft at that time on any of those occasions which he questioned you about, except this one of December 9th, which I am going to take up in a moment? A. No, sir, there is none.

Q. And according to the system in the bank, if there had been an overdraft at that time, there would have been an entry in red ink?

Mr. Hughes: I object to that. He is dealing with the facts now. As matter of fact, not even the bookkeeper knows that.

The Court: It does not prove an overdraft; it merely means the custom to which
419 he has testified—that the inference is that there was no overdraft; that if there was an overdraft, something else would have been done.

Mr. Allen: That is all I am asking him.

The Witness: May I have the question?

Mr. Allen: Yes, read it.

The Court: I assume, of course, it is perfectly possible that there might have been an overdraft, and that the custom might not have been adhered to in every case, and I assume if that were true, it might be susceptible of proof; I do not know.

Mr. Hughes: According to the testi-
420 mony, even the bookkeepers would not know whether there had been or not.

The Court: He testified to the custom, which I assume is not a casual thing, that in the ordinary and usual and daily course of business, that an overdraft would have been indicated in such and such a way, and that if there was no such indication on the record, he assumes there was not an overdraft. Was that the invariable custom of the bank?

The Witness: Yes, sir.

Mr. Hughes: Will you note my exception?

The Court: Yes.

Mr. Allen: I do not need an answer, then, to that specific question, in view of your Honor's later question. Now, may I withdraw this witness for a moment, and put Mr. Lyon on?

The Court: Yes.

EDWARD A. LYON, called as a witness on behalf of the defendant, being duly sworn, testified as follows: 422

Direct examination by Mr. Allen.

Q. Mr. Lyon, what is your occupation, sir? A. Treasurer of the Empire Trust Company.

Q. For how long have you been treasurer of the Empire Trust Company? A. A little over a year.

Q. What was your position before that? A. Assistant secretary.

Q. How long were you assistant secretary? A. About ten years.

Q. And in August, 1916, were you assistant secretary at that bank? A. I was.

Q. I show you this check, Plaintiff's Exhibit No. 5-A, and also a photostatic copy of a deposit slip, Defendant's Exhibit A-19 (handing papers to witness). I ask you if your initials appear on either or both of those exhibits? A. They do, sir. 423

Q. On one or both? A. On both.

Q. Will you state why you placed your initials on those, if you recall? A. The check was brought to me for approval in taking it for immediate credit.

Q. Just what do you mean by that? A. Our customer asked to have the item taken as a cash item, and it was brought to me to approve of doing that.

Q. There would be a withdrawal against it? A. So that it could be as cash, and he could get immediate credit for it.

Q. So that he could draw against it immediately? A. Yes.

Q. And that was the reason you placed your initials on both the check and the deposit slip, is that correct? A. Yes.

Q. Now, is there any general custom of the bank, when a customer is depositing a check for immedi-
425 ate withdrawal, that the paying teller or the receiving teller, who receives it, or the paying teller who is to pay out against it, shall consult an officer of the bank and get his O K before so doing? A. That is the custom, yes.

Mr. Allen: You may examine.

Cross examination by Mr. Hughes.

Q. Are not all certified checks received for immediate credit? A. No, sir.

Q. I see. Well, they are credited immediately, are they not? A. Every check is credited immedi-
426 ately on the books.

Q. I see. But even against a certified check you do not allow an immediate withdrawal? A. Not unless it is approved by an officer.

Q. Now, that check has been brought to you specifically for initialing—by whom? The receiving teller, was it? A. By the receiving teller's department, yes.

Q. Did you look particularly at the form of the check? A. I always look at every check before I initial it.

Q. You noted that it was drawn in the name of C. H. Cahan by C. H. Cahan, Jr.? A. I saw the check.

Q. But did that impress itself particularly upon your mind? A. No.

Q. Or, that being drawn in the name of C. H. Cahan, by C. H. Cahan, Jr., it was made payable to C. H. Cahan, Jr. himself? A. No.

Q. That made no impression on you? A. No.

Q. Then, I take it that you made no inquiries of Mr. Cahan, Sr.—Mr. C. H. Cahan—as to whether the check was authorized by him or was proper? A. No, sir.

Q. Did you make any inquiries of any kind of 428
anybody? A. No.

Q. No inquiries at all? A. No.

Q. What do you mean by "immediate credit"? A. So that the check may be taken to the paying teller and cashed, if necessary, if he so desired.

Q. So that it may be drawn upon the same day? A. Yes, sir.

Q. Unless it was initialed for immediate credit, it could not be drawn upon the same day, is that it? A. We would not pay against it the same day; twenty-four hours clearance.

Q. May I see the check? A. (Handing paper to Mr. Hughes.)

Q. These are your initials? A. Yes, "E. A. L." 429

Mr. Hughes: No further cross-examination.

Mr. Allen: That is all, Mr. Lyon.

Mr. Hughes: Just one moment.

By Mr. Hughes.

Q. Mr. Lyon, I note there are certain other checks amongst these twenty that have been marked in evi-

dence, that bear initials. Can you tell me as to any of them whose initials they are, or whether they are any initials of persons connected with the Empire Trust Company? For instance, Plaintiff's Exhibit No. 5-C, two initials on the bottom of the check (handing paper to witness)? A. I do not recognize them, no.

Q. And as to Plaintiff's Exhibit 5-D, two initials at the bottom and one in the upper left-hand corner (handing paper to witness)? A. To the best of my knowledge, they are not connected with the Empire Trust.

431

Mr. Hughes: No further cross-examination.

Mr. Allen: That is all.

(Witness excused.)

Mr. Allen: Shall we adjourn now, your Honor?

The Court: Yes, until about five minutes after two.

Mr. Vesder: Shall we make it later than that? It is immaterial to us.

The Court: Yes, I will say ten minutes after two.

(Recess.)

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AFTERNOON SESSION.

DAVID C. BANKS, resumed the stand.

Mr. Allen: I offer in evidence carbon copy of a letter of December 20, 1915, addressed to Mr. C. H. Cahan. We understand that this letter was intended to be and was sent to

Mr. C. H. Cahan, Jr. Apparently the "Jr." was left off.

(Paper marked Defendant's Exhibit E.)

Mr. Hughes: No objection, if there is no purpose on the part of the defendant to prove that Mr. C. H. Cahan got that letter?

Mr. Allen: No, no purpose of that sort whatever.

By Mr. Hughes.

Q. Just one word more, Mr. Banks, about this book, Defendant's Exhibit B for Identification. On 434
these pages that have been marked in evidence, Defendant's Exhibits C and D, I am correct in understanding, am I not, that these pages contain records of the transactions of that part—particular part of the day—that particular block of checks there entered, of all depositors; that is, these entries on the pages, Defendant's Exhibits C and D, are not limited to the transactions of C. H. Cahan, Jr.? A. No, sir, they are limited to the A to E ledger—all depositors coming within that ledger.

Q. All depositors from A to E? A. Yes, sir.

Q. I asked you on former cross-examination, whether you know how the Empire Trust Company had knowledge of the powers of attorney lodged with the Guaranty Trust Company and the agents 435
of the Bank of Montreal, and you said you did not know. A. Yes.

Q. I simply wish to ask, in addition, whether you know at all if it was the fact that the Empire Trust Company had any knowledge of those powers of attorney? A. None to my knowledge.

Mr. Hughes: That is all.

Mr. Allen: That is all.

(Witness excused.)

PETER J. DEVLIN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Allen.

Q. Mr. Devlin, what is your occupation, sir? A. Assistant secretary of the Empire Trust Company.

Q. And how long have you held that position? A. About a year.

Q. And before that, were you connected with that bank? A. Yes.

437 Q. In what capacity? A. Well, I have been in most every position through the bank.

Q. Were you ever in the loan department? A. Just immediately before that, yes, I was in the loan department.

Q. How long were you in the loan department? A. Oh, about five or six years.

Q. Were you in the loan department in the years 1915 and 1916? A. Yes.

Q. And 1917? A. No, not in 1917.

Q. I see. What record, if any—what original record, if any, did the Empire Trust Company keep in the years 1915, 1916, 1917, 1918 and 1919, regarding any loans—what record, if any, original record?

438 A. The original record would be in the loan journal.

Q. Was that kept daily or how? A. Daily.

Q. During that period, the period of those years? A. Yes.

Q. And is still kept? A. Yes, it is still kept.

Q. Now, have you made an examination of the loan journal or the loan journals for the years 1915, 1916, 1917, 1918 and 1919, inclusive—have you examined them? A. Yes, sir.

Q. Is there any record therein of any loan made to C. H. Cahan, Jr.? A. No.

Q. And you have examined them? A. I have.

Mr. Allen: That is all.

Mr. Hughes: No cross-examination.

(Witness excused.)

Mr. Allen: The defendant rests.

DEFENDANT RESTS.

Mr. Hughes: Will you take the stand again, Mr. Cahan.

440

CHARLES HAZLITT CAHAN, the plaintiff, recalled in rebuttal, having been previously duly sworn, further testified as follows.

Direct examination by Mr. Hughes.

Q. Mr. Cahan, I call your attention to your testimony on cross-examination on page 82 of the stenographic minutes (*supra*, pp. 93-94), as follows: "Q. And yet you do not know what he did with the proceeds? A. Simply because all the checks which he drew are in the possession of the Empire Trust Company, and I have never seen them, but I presume he took them back, and I have not seen them." I ask you whether there is anything that you wish to say in amplification or correction of that testimony? A. Yes. Last night I was thinking over that, and I do remember that in some litigation in Montreal there were produced, two of them, I think—it may possibly have been three, but I think it was two checks drawn on the Empire Trust Company

441

account by C. H. Cahan, Jr., which were attached to the vouchers for payments, which were found in his possession. Now, those would either be with my own lawyer in Montreal, or with Mr. McEwen, the attorney of the Home Bank, and I could produce those, but they had skipped my mind entirely; but there were those found. They were payments for considerable amounts, made by him for his own personal account.

Q. Are you able to testify from your recollection of those checks that those which you have seen did not concern your affairs in any way? A. They did
443 not concern me directly or indirectly, and, if necessary, I think I can get them from either one or the other. It is some time ago, and it slipped my memory, but it came back to me again. I think I can produce them, if necessary.

Q. And except for those few checks which you have just mentioned, have you ever had in your possession or have you ever seen any returned checks relating to C. H. Cahan, Jr.'s account with the Empire Trust Company? A. Absolutely none, no.

Q. And have you made a search through his places of residence and anywhere that you thought such canceled checks might be? A. I have made every search possible through all his affairs.

Q. Will you look through these deposit slips, De-
444 fendant's Exhibit A to A-20 inclusive, and tell me, identifying them by the exhibit number on the back, on which ones the words "C. H. Cahan, Jr." under the printed "For account of" are in the handwriting of C. H. Cahan, Jr. (handing papers to witness). A. A-19, A-18—perhaps I am running backwards.

Q. Well, that is the way they happen to be. A. A-8, A-6, A-5. A-1 maybe, but it is so faint that I would not pretend to say; and there is another one, which is A-4, I should not think—I would not ac-

cept it as his, and I am in doubt about A-7 as well. It does not look to me like his.

Mr. Hughes: As to A-1, there has already been testimony that that was written by a teller of the Empire Trust Company.

Q. Now, Mr. Cahan, referring to the matter that was gone into on the case of the Empire Trust Company and the entry in their book, Defendant's Exhibit B for Identification, of the debit against the account of C. H. Cahan, Jr., on August 2nd, 1916, of a check which is entered here as being to "C. H. Cahan," and in connection with the testimony which 446
has been given of a deposit to your credit in the Guaranty Trust Company of $2500 on August 2nd, I wish to ask you if prior to this date of August 2nd, 1916, your son C. H. Cahan, Jr., had drawn checks or otherwise withdrawn from your account in the Guaranty Trust Company other moneys other than the ones which are involved in this suit? A. Yes.

Q. Will you describe them briefly?

Mr. Veeder: I object to the materiality of that.

The Court: Yes, how is that material? It is a mere statement of fact that he has drawn other checks for other purposes. Now, 447
how can it be material to go into the details of those other checks?

Mr. Hughes: I do not care to go into the details particularly. What I had in mind was that the defendant would probably use this evidence to attempt to establish a set-off against the liability here, in view of the fact that they would claim that this $2500 had

gone back into the father's account with the Guaranty Trust Company.

The Court: Yes.

Mr. Hughes: It seemed to me material on that, to show that in other transactions the son had committed defalcations on the Guaranty Trust Company account prior to this transaction, and other than the items involved in this suit, and to an amount very much larger than the $2500 in question.

The Court: That, I suppose, would be a conclusion from the date of the checks antedating August 2nd?

449 Mr. Hughes: Yes.

The Court: So that would be purely a matter of argument on the record.

Mr. Hughes: But those checks are not in evidence.

The Court: You mean the other checks?

Mr. Hughes: Yes, they are not concerned in this litigation.

The Court: You might go into it generally, but I think you should not go into the details.

Mr. Hughes: Merely on what I assume will be a claim of set-off——

Mr. Vesder (interposing): I have no pres-

450 ent intention of making any such claim.

The Court: If the defendant, then, disclaims any intention of claiming it—indeed, it is not set up, is it?

Mr. Vesder: No.

Mr. Hughes: Then, if the defendant disclaims any intention of attempting to use this $2500 item which went into the Guaranty Trust Company, as a set off against any

liability that may be established in this suit, I will not press this inquiry.

Mr. Vesder: Let me make myself perfectly plain, Mr. Hughes. I stated that I had no present intention of making any such claim in this action; but in view of the testimony of Mr. Cahan as to the spoliation of his account, and the fact that I understand he is making similar claims in other cases where funds have been transferred from one bank to another, I base my statements on the testimony in the Canadian case, that in the event of any recovery by him against this 452
bank, we might have occasion hereafter to seek to recoup, and I am not limiting myself in any way except in this particular action.

The Court: But the defendant had not pleaded that in this case?

Mr. Vesder: No.

The Court: Therefore it, ordinarily, would not be a matter that could be adjudicated in this trial; not res adjudicata as to either the plaintiff or the defendant.

Mr. Vesder: That is my view.

Mr. Hughes: Then, it becomes immaterial in this action. What may happen in the future we are not concerned with. That is all, Mr. Cahan. The plaintiff rests. 453

The Court: Both sides rest?

Mr. Vesder: Yes.

Mr. Hughes: Oh, I beg your pardon; just a moment before I rest.

The Court: Yes, you have a bank account to be introduced.

Mr. Hughes: Yes. Well, that is so long, I have found, that I hesitate to encumber the record with it.

Mr. Allen: The agency of the Montreal Bank transcript?

Mr. Hughes: Yes, I do not think there is any necessity of putting it in.

(Informal discussion amongst counsel and the Court, off the record.)

Mr. Hughes: Now, in regard to these powers of attorney——

The Court: Oh, yes, the original powers of attorney.

Mr. Hughes: Yes, the original powers of attorney—inadvertently I put the originals
455 that came from the agency of the Bank of Montreal—had them marked in evidence, and the agents of the Bank of Montreal want them back again, so may we have the copies that were originally marked for identification as Plaintiff's Exhibits 2, 3 and 4 for Identification, marked in evidence as Plaintiff's Exhibits 2, 3 and 4, and substituted for the originals?

The Court: I assume they have been compared, and that counsel agree that they are exact copies?

Mr. Hughes: I think they have been compared by counsel, by both sides.

The Court: Then, the copies that are now
456 marked for identification may be marked in evidence with corresponding numbers.

Mr. Hughes: Those that have been heretofore marked in evidence may be returned to agents of the Bank of Montreal?

The Court: Yes.

Mr. Hughes: I also desire to offer in evidence the letters between the Empire Trust Company and C. H. Cahan, Jr., which have

heretofore been marked Plaintiff's Exhibits 12, 13, 14 and 15 for Identification (handing papers to Mr. Vesder).

Mr. Vesder: Mr. Hughes, what is the materiality of this note collection?

Mr. Hughes: The only materiality is as evidence that they were doing this for the personal account of C. H. Cahan, Jr.

The Court: If it has any force at all, it is merely cumulative.

(Informal discussion amongst counsel and the Court, off the record.)

The Court: They will be received in evi- 458
dence.

Mr. Hughes: And I also desire to offer in evidence the letter of the Empire Trust Company to C. H. Cahan, Sr., August 5, 1920, acknowledging receipt of his formal demand.

Mr. Vesder: No objection.

(Paper marked Plaintiff's Exhibit No. 22.)

Mr. Hughes: Now, the plaintiff rests, and pursuant to the stipulation the plaintiff moves for the direction of a verdict in his favor.

Mr. Vesder: And I move for the direction 459
of a verdict in favor of the defendant.

The Court: Now, do you want to prepare briefs and be heard at length on the matter? I have been giving a little study to this, but I have kept my mind open and free on the proposition. I think it is going to narrow right down to a very clean-cut issue.

Mr. Hughes: There are two different sets of transactions, and slightly different legal

considerations apply to the two; the one in regard to the three checks aggregating $7500, that were drawn to the order of the Empire Trust Company, and deposited in the account of C. H. Cahan, Jr., and then the other seventeen which were drawn to the order of C. H. Cahan, Jr., and by him endorsed to the Empire Trust Company; and then there remains the 21st, in which category we do not know. The plaintiff would like to be heard at length, and particularly in view of your Honor's intimation last night that your first impression
461 was possibly contrary to our contention, on some of the points anyway, we desire to present the matter fully and to argue it fully. We are prepared to argue orally now, if your Honor desires to decide it here, but if your Honor would rather take it under advisement, we would rather prepare a brief and have argument later.

The Court: I will leave it to you.

(Informal discussion amongst counsel and the Court, off the record.)

Mr. Hughes: I had just as soon submit my brief first, and have Judge Veeder answer it, and then reply, if reply be deemed necessary.

462 The Court: You gentlemen agree upon dates for the exchange of your briefs, and then serve your briefs upon my secretary in the Woolworth Building, and then after I have had time to examine them, my secretary will notify both of you as to the hour and place of argument; and, if necessary, I will hear it in my chambers, perhaps after a court day or on Saturday morning. I will be very glad to try and accommodate counsel in that

regard, and I will leave it in that rather indefinite shape.

(Adjourned without date, subject to notice from the Court of the date for argument.)

New York, December 22, 1924.

Present:

Mr. HUGHES,
Mr. VEEDER.

(After informal discussion off the record of the Court's opinion and of the question whether interest on the amount of the checks should be allowed as demanded in the complaint.) 464

The Court: I will direct a verdict for the plaintiff in the sum of $31,170, being the aggregate amount of the checks without interest thereon.

Mr. Veeder: The defendant takes an exception to the direction of this verdict.

Mr. Hughes: The plaintiff takes an exception to the direction of the Court in so far as it fails to direct the inclusion in the verdict of interest on the amounts of the checks as demanded in the complaint.

Pursuant to the Court's direction, the jury of one finds a verdict in the above amount. 465

Mr. Veeder: The defendant takes an exception to the verdict as directed.

Mr. Hughes: The plaintiff takes an exception to the verdict in so far as it fails to include interest on the checks as demanded in the complaint.

466 **Plaintiff's Exhibit 1.**

KNOW ALL MEN BY THESE PRESENTS, that I, Charles H. Cahan, of the City of Montreal, but at present in the City of New York, United States of America, have made, constituted and appointed, and by these presents, do make, constitute and appoint Charles H. Cahan Junior my true and lawful attorney for me and in my name, place and stead, to sign, endorse, deposit, draw, and deliver all such checks and other orders for the payment of money as he may deem proper in connection with any account of funds on deposit which I may now or hereafter have with the GUARANTY TRUST COMPANY OF NEW YORK, its agents, successors or as-
467 signs; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I myself might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the twenty-first day of September in the year one thousand nine hundred and sixteen.

C. H. CAHAN (Seal)

468

Sealed and delivered in
the presence of:

A. C. BOURNE
WILLIAM P. MULLEN

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

BE IT KNOWN, that on the twenty-first day of September one thousand nine hundred and sixteen before me, William P. Mullen, a Notary Public in and for the State of New York duly commissioned and sworn, dwelling in the City of New York, personally came and appeared CHARLES H. CAHAN, to me known, and known to me to be the person described in and who executed the annexed power of Attorney, and acknowledged the execution of the same to be his free act and deed. 470

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal of office, the day and year last above written.

WILLIAM P. MULLEN.
Notary Public New York County No. 396.
New York Registers No. 8304.
(Seal)

471

472 **Plaintiff's Exhibit 2.**

May 29, 1916.

KNOW ALL MEN BY THESE PRESENTS that I, CHARLES H. CAHAN, of the City of Montreal, in the Province of Quebec, Barrister-at law, but at present at the City of New York, in the State of New York, do hereby nominate and appoint CHARLES HAZLITT CAHAN, JUNIOR, as my Attorney, for me, in my name, and on my behalf, to make, sign and draw cheques, on my account with the Agents of the Bank of Montreal, New York City, and to receive all paid cheques, and to sign the said Bank's form of settlement of balances, during the period of two months
473 from the date hereof, hereby ratifying and confirming all that my said Attorney may do in the premises.

IN WITNESS WHEREOF I have hereunto my hand and seal subscribed and set this 29th day of May A. D. 1916.

(Sgd.) C. H. CAHAN

Signed, sealed and delivered
in the presence of:
(Sgd.) M. S. KENDALL

474

Plaintiff's Exhibit 3.

475

July 29, 1916

KNOW ALL MEN BY THESE PRESENTS that I, CHARLES H. CAHAN, of the City of Montreal, in the Province of Quebec, Barrister-at-law, but at present at the City of New York, in the State of New York, do hereby nominate and appoint CHARLES HAZLITT CAHAN, JUNIOR, as my Attorney, for me, in my name, and on my behalf, to make, sign and draw cheques, on my account with the Agents of the Bank of Montreal, New York City, and to receive all paid cheques, and to sign the said Bank's form of settlement of balances, during the period of three months from the date hereof, 476
hereby ratifying and confirming all that my said Attorney may do in the premises.

IN WITNESS WHEREOF, I have hereunto my hand and seal subscribed and set this 29th day of July, A. D. 1916.

(Sgd) C. H. CAHAN

Signed, sealed and delivered
in the presence of:

(Sgd) M. S. KENDALL

477

478 *Plaintiff's Exhibits.*

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

On this 31st day of August, A. D. 1916, before me personally came M. S. Kendall, to me known, who, being by me duly sworn, did depose and say, that she is the subscribing witness to the annexed Power of Attorney, and that C. H. Cahan did execute the same in her presence.

(Sgd) M. S. KENDALL

479 Sworn to before me, at the City of New York this 31st day of August A. D. 1916.

(Sgd) ABRAHAM N. LEVY
Com. of Deeds
New York City

480

Plaintiff's Exhibit 4.

481

KNOW ALL MEN BY THESE PRESENTS that I, CHARLES H. CAHAN, of the City of Montreal, in the Province of Quebec, Barrister-at-law, but at present at the City of New York, in the State of New York, do hereby nominate and appoint Charles Hazlitt Cahan, Junior, as my Attorney, for me, in my name, and on my behalf, to make, sign and draw cheques, on my account with the Agents of the Bank of Montreal, New York City, and to receive all paid cheques, and to sign the said Bank's form of settlement of balances, hereby ratifying and confirming all that my said Attorney may do in the premises.

482

IN WITNESS WHEREOF, I have hereunto my hand and seal subscribed and set this 30th day of October A. D. 1916.

C. H. CAHAN (Seal)

Signed, sealed and delivered
in the presence of:

M. S. KENDALL

483

484 *Plaintiff's Exhibits.*

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

On this 30th day of October A. D. 1916, before me personally came M. S. Kendall, to me known, who, being my be duly sworn, did depose and say, that she is the subscribing witness to the annexed Power of Attorney, and that C. H. Cahan did execute the same in her presence.

(Sgd) M. S. KENDALL

485 Sworn to before me, at the City of New York, this 30th day of October A. D. 1916.

(Sgd) WILLIAM P. MULLEN
Notary Public
New York County No. 396
New York Registers No. 8304

(Seal)

486

Plaintiff's Exhibit 5. 487

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.
NA

No. 371. New York, July 12th 1916.

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of C. H. Cahan Junior One Thousand Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$1000.00 488

(*Stamped across face of check*)

NA Accepted
July 12 1916
Agents Bank of Montreal
AH J. W. Fischer, Agent

(*Endorsements*)

C. H. Cahan Jr.

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co. 489
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Jul 12 1916
Hanover National Bank

490 **Plaintiff's Exhibit 5-A.**

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.
NA

No. 387 New York, Aug 1-1916

To the Agents BANK OF MONTREAL
64 Wall St., New York. EAL

Pay to the order of C. H. Cahan, Jr. Five Thousand Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
491 His Attorney.
$5000 00/100

(Stamped across face of check)

Accepted NA
Aug 1 1916
Agents, Bank of Montreal
AH J. W. Fischer, Agent

(Endorsements)

C. H. Cahan Jr.

Pay to the Order of
Hanover National Bank
New York
492 Empire Trust Co.
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Aug 2 1916
Hanover National Bank

Plaintiff's Exhibit 5-B. 493

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.
NA

No. 415. New York, September 1st 1916

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of C. H. Cahan Junior Two Thousand Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$2000.00

(Stamped across face of check) 494

Accepted NA
Sep 1 1916
Agents, Bank of Montreal
AH J. W. Fischer, Agent

(Endorsements)

C. H. Cahan Jr.

City Collection Dept.
Paid
Endorsement Guaranteed
Sep 1 1916
The National City Bank
of New York

495

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Sep 1 1916
Hanover National Bank

496 **Plaintiff's Exhibit 5-C.**

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.

No. 435 New York, September 20th, 1916

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of The Empire Trust Company Thirty Five Hundred Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$3500.00

(Stamped across face of check)

497 Accepted
Sep 20 1916
Agents, Bank of Montreal AC
A. H. Cammack, Agent AC

(Endorsements)

Credit Account of
C. H. Cahan Jr.
With
Empire Trust Company
E N, Teller

Received Payment
Through
New York Clearing House
498 Sep 20 1916
Hanover National Bank

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Sep 20 1916
Hanover National Bank

Plaintiff's Exhibit 5-D. 499

NA

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.

No. 449 New York, Sep 30 1916

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of The Empire Trust Company One Thousand Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$1000 00/100

(Stamped across face of check) 500

Accepted
Sep 30 1916
Agents, Bank of Montreal AH
J. W. Fischer, Agent AC

(Endorsements)

Credit Account of
C. H. Cahan Jr.
With
Empire Trust Company
E N, Teller

Pay to the Order of
Hanover National Bank
New York 501
Empire Trust Co.
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Sep 30 1916
Hanover National Bank

502 **Plaintiff's Exhibit 5-E.**

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.
NA
BC

No. 456 New York, Oct 13 1916

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of C. H. Cahan Jr. Six Hundred Seventy Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

503 $670 00/100

(Stamped across face of check)

Accepted
Oct 13 1916
Agents, Bank of Montreal
J. W. Fischer, Agent NA

(Endorsements)

C. H. Cahan Jr.

Received Payment
Through
New York Clearing House
Oct 13 1916
Hanover National Bank

504

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Oct 13 1916
Hanover National Bank

Plaintiff's Exhibit 5-F. 505

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.
NA

No. 473 New York, Nov 1 1916

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of C. H. Cahan Junior One Thousand Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR. 506
His Attorney.

$1000.00

(Stamped across face of check)

Accepted NA
Nov 1 1916
Agents, Bank of Montreal
A. H. Cammack, Agent AH

(Endorsements)

C. H. Cahan Jr.

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co. 507
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Nov 1 1916
Hanover National Bank

508 **Plaintiff's Exhibit 5-G.**

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.
NA

No. 495 New York, Nov 17 1916

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of C. H. Cahan, Junior One Thousand Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
509 $1000.00 His Attorney.

(Stamped across face of check)

Accepted NA
Nov 20 1916
Agents, Bank of Montreal
J. W. Fischer, Agent AH

(Endorsements)

C. H. Cahan Jr

Pay to the Order of
Hanover National Bank
New York
510 Empire Trust Co.
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Nov 20 1916
Hanover National Bank

Plaintiff's Exhibit 5-H. 511

R. Y. Helsden, W. A. Bog, J. T. Molineux, Agents.
NA

No. 514 New York, November 29th 1916.

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of C. H. Cahan Junior One Thousand Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$1000.00 512

(Stamped across face of check)

Accepted NA
Nov 29 1916
Agents, Bank of Montreal
J. W. Fischer, Agent AH

(Endorsements)

C. H. Cahan Jr.

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co. 513
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Nov 29 1916
Hanover National Bank

514 **Plaintiff's Exhibit 5-I.**

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.
NA

No. 569 New York, Jan 2 1917

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of C. H. Cahan Junior One Thousand Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$1000.00

515 *(Stamped across face of check)*

Accepted NA
Jan 2 1917
Agents, Bank of Montreal
J. W. Fischer, Agent AH

(Endorsements)

For Deposit to Credit of
C. H. Cahan, Jr.
at Empire Trust Co.
per M. A. N.

Endorsement Guaranteed
Empire Trust Co.
New York

516

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Jan 2 1917
Hanover National Bank

Plaintiff's Exhibit 5-J. 517

GUARANTY TRUST COMPANY
OF NEW YORK

No. New York, Jan 3 1917

Pay to the order of The Empire Trust Company
Three Thousand Dollars.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$3000.00

18574

(Stamped across face of check) 518

Certified
Jan 3 1917
Payable Through
New York Clearing House
C. H. Meeder

(Endorsements)

C. H. Cahan Jr.

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
Myron J. Brown, Secty. 519

Received Payment
Through
New York Clearing House
Jan 3 1917
Hanover National Bank

520 **Plaintiff's Exhibit 5-K.**

GUARANTY TRUST COMPANY
OF NEW YORK

No. New York, January 13th 1917.

Pay to the order of C. H. Cahan Jr. Four Thousand Dollars

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$4000.00

1998?

521 (*Stamped across face of check*)

Certified
Jan 13 1917
Payable Through
New York Clearing House
C. H. Meeder

(*Endorsements*)

C. H. Cahan Jr

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.

522 Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Jan 13 1917
Hanover National Bank

Plaintiff's Exhibit 5-L. 523

GUARANTY TRUST COMPANY
OF NEW YORK

No. 34 New York, March 22 1917

Pay to the order of C. H. Cahan Junior Five Hundred Dollars.

WD

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$500.00

29862

524

(*Stamped across face of check*)

Certified
Mar 22 1917
Payable Through
New York Clearing House
C. H. M.

(*Endorsements*)

C. H. Cahan Jr

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co. 525
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Mar 22 1917
Hanover National Bank

526 **Plaintiff's Exhibit 5-M.**

GUARANTY TRUST COMPANY
OF NEW YORK

No. New York, Apr 12 1917

Pay to the order of C. H. Cahan, Jr. Five Hundred Dollars.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$500 00/100

33050

527 *(Stamped across face of check)*

Certified
Apr 12 1917
Payable Through
New York Clearing House
C. H. M.

(Endorsements)

C. H. Cahan Jr.

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
528 Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Apr 12 1917
Hanover National Bank

Plaintiff's Exhibit 5-N. 529

GUARANTY TRUST COMPANY
OF NEW YORK

No. New York, May 26 1917

Pay to the order of C. H. Cahan, Jr. Seven Hundred Fifty Dollars.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$750.00

39714

(Stamped across face of check) 530

Certified
May 26 1917 D
Payable Through
New York Clearing House
C. H. Meeder

(Endorsements)

C. H. Cahan Jr.

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
Myron J. Brown, Secty. 531

Received Payment
Through
May 26 1917
New York Clearing House
Hanover National Bank

532 **Plaintiff's Exhibit 5-O.**

GUARANTY TRUST COMPANY
OF NEW YORK

No. New York, May 29th 1917

Pay to the order of C. H. Cahan Junior Five Hundred Dollars.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$500.00

Charged in former balance.

40044

533

(*Stamped across face of check*)

Certified
May 29 1917
Payable Through D
New York Clearing House
C. H. Meeder

(*Endorsements*)

C. H. Cahan Jr.

Pay to the Order of
Hanover National Bank
New York
534 Empire Trust Co.
Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
May 29 1917
Hanover National Bank

Plaintiff's Exhibit 5-P. 535

GUARANTY TRUST COMPANY
OF NEW YORK

No. New York, Jul 27 1917

Pay to the order of C. H. Cahan Junior Five Hundred Dollars.
Charged in former balance.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$500.00

147901

536

(Stamped across face of check)

Certified
Jul 27 1917
Payable Through
New York Clearing House
C. H. Meeder

(Endorsements)

C. H. Cahan Jr.
Harry A. Peck

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co
Myron J. Brown, Secty.

537

Received Payment
Through
New York Clearing House
Jul 27 1917
Hanover National Bank

538 **Plaintiff's Exhibit 5-Q.**

GUARANTY TRUST COMPANY
OF NEW YORK

No. 39 New York, Aug 20 1917

Pay to the order of C. H. Cahan, Jr. One Thousand Dollars.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$1000.00

50741 WD

539 *(Stamped across face of check)*

Certified
Aug 20 1917
Payable Through
New York Clearing House
C. H. Meeder

(Endorsements)

C. H. Cahan Jr.

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
540 Myron J. Brown, Secty.

Received Payment
Through
New York Clearing House
Aug 20 1917
Hanover National Bank

Plaintiff's Exhibit 5-R. 541

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.
N

No. 123 New York, Aug 31 1917

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of C. H. Cahan Junior Five hundred Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$500.00 542

(*Stamped across face of check*)

Not over Five Hundred $500.00

(*Endorsements*)

For deposit only
to credit of
C. H. Cahan, Junior.

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
Myron J. Brown, Secty. 543

Received Payment
Through
New York Clearing House
Sep 1 1917
Hanover National Bank

544 **Plaintiff's Exhibit 5-S.**

R. Y. Hebden, W. A. Bog, J. T. Molineux, Agents.
N

No. 121 New York, September 1st 1917.

To the Agents BANK OF MONTREAL
64 Wall St., New York.

Pay to the order of C. H. Cahan Junior Three hundred and fifty Dollars through the New York Clearing House.

C. H. CAHAN,
By C. H. CAHAN JR.
His Attorney.

$350.00

545

(Stamped across face of check)

Not over Three Hundred Fifty $350.00

(Endorsements)

For deposit only
to credit of
C. H. Cahan, Junior.

Pay to the Order of
Hanover National Bank
New York
Empire Trust Co.
Myron J. Brown, Secty.

546 Received Payment
Through
New York Clearing House
Sep 1 1917
Hanover National Bank

Received Payment
Through
New York Clearing House
Sep 1 1917
Hanover National Bank

Plaintiff's Exhibit 6. 547

(Check Stub—Agents Bank of Montreal)

387 Aug. 1, 1916

Guaranty Trust Co. of N. Y. $5000.00

Plaintiff's Exhibit 6-A.

(Check Stub—Agents Bank of Montreal)

415 Sept. 1, 1916

N. Y. Telephone Co. 9.27

548

Plaintiff's Exhibit 6-B.

(Check Stub—Agents Bank of Montreal)

449 Oct. 2, 1916

Guaranty Trust Co. of New York 1000.00

Plaintiff's Exhibit 6-C.

(Check Stub—Agents Bank of Montreal)

456 Oct. 13, 1916 549

Cash for telegrams 6.70

Plaintiff's Exhibit 6-D.

(Check Stub—Agents Bank of Montreal)

473 Nov. 1, 1916

Cash for Box of Cigars 5.25

550 **Plaintiff's Exhibit 6-E.**

(Check Stub—Agents Bank of Montreal)

495 **Nov. 16**

Paid for Notarial Cert. & County Court Clerks fees **1.95**

Plaintiff's Exhibit 6-F.

(Check Stub—Agents Bank of Montreal)

514 **Dec. 1, 1916**

Cash **7.50**

551

Plaintiff's Exhibit 6-G.

(Check Stub—Agents Bank of Montreal)

569 **Jan. 2, 1917**

Cash **5.00**

Plaintiff's Exhibit 6-H.

(Check Stub—Guaranty Trust Company)

552 **No. 34** **Date May 12, 1917**

Pay to J. L. Hetherington to pay for Foley on acct. retaining wall **1000.00**

Plaintiff's Exhibit 6-I.

553

(Check Stubs—Guaranty Trust Company)

No. 37 Dated Jun. 25, 1917

Pay to J. L. Hetherington 1000.00

No. 38 Date June 28, 1917

Pay to Col. B. A. Weston for re St. Math. Sunday School 500.00

No..... Date (Aug. 18, 1918, crossed out) 554

Pay to .....

for .....

Plaintiff's Exhibit 6-J.

(Check Stubs—Guaranty Trust Company)

No. 40 Date July 25, 1917

Pay to Corporation Agencies Ltd. for Corporation Estates int. to Goyer 2481.18

555

No. 41 Date Jul. 27, 1917

Pay to Collector of Internal Revenue for income tax 1008.70

No. 42 Date Aug. 2, 1917

Pay to J. L. Hetherington for to pay certain bills 350.00

556 **Plaintiff's Exhibit 8.**

C. H. CAHAN K.C.
Barrister and Solicitor

Transportation Building
St. James Street

Cables—"Nahac Montreal"
Codes—Liebers
Western Union
Post Office Box 356
Telephone Main 1250-1251

C. H. CAHAN, K.C.

Montreal, Canada.

February 19th, 1920.

The Manager of
The Empire Trust Company,
120 Broadway,
New York, N. Y.

557

Dear Sir:

I recently ascertained that my son, C. H. Cahan, Jr., has, during recent years, misappropriated large sums of money, of part of which I was the owner personally, and a considerable part of which were trust funds.

He has disappeared, and so far we can find no trace of him.

I have had Messrs. Price, Waterhouse & Company investigating the accounts, which he falsified from time to time; and the extent of these defalcations at present appears to amount to $175,000 to $200,000.

558 In a private safe-box of his, I have now found some cancelled cheques concealed, which disclose that he kept a personal account with your Company, the Empire Trust Company, at New York; and that, purporting to act as my Attorney, he has drawn cheques upon my accounts at Guaranty Trust Company of New York and upon the Agents of the Bank of Montreal at New York; and that he has diverted the funds, represented by these

cheques, and misappropriated them to himself by placing these cheques to his personal credit in his personal account with your Trust Company at New York.

These checks are all fraudulently made and issued.

So far, I have discovered the following cheques, all of which purport to be drawn by "C. H. Cahan, by C. H. Cahan, Jr., his Attorney" and all are endorsed "C. H. Cahan, Jr."; and all of these cheques appear, from your Trust Company's endorsements stamped thereon, to have been placed by him to his credit in his personal account with your Trust Company at New York:

Date	Drawee	Payee	Amount
July 12, 1916	Agents of Bank of Montreal, N. Y.	C. H. Cahan, Junior	$1,600.
Aug. 1, 1916	do do do	do do	5,000.
Sept. 1, 1916	do do do	do do	2,000.
Sept. 20, 1916	do do do	The Empire Trust Company	3,500.
Sept. 30, 1916	do do do	do do	1,000.
Oct. 13, 1916	do do do	C. H. Cahan, Junior	670.
Nov. 1, 1916	do do do	do do	1,000.
Nov. 17, 1916	do do do	do do	1,000.
Nov. 29, 1916	do do do	do do	1,000.
Dec. 1, 1916	do do do	do do	1,000.
Jan. 2, 1917	do do do	do do	25.
Jan. 3, 1917	Guaranty Trust Co. of N. Y.	The Empire Trust Company	3,000.
Jan. 13, 1917	do do do	C. H. Cahan, Junior	4,000.
Mar. 22, 1917	do do do	do do	500.
May 26, 1917	do do do	do do	750.
May 29, 1917	do do do	do do	500.
Apr. 12, 1917	do do do	do do	500.
Aug. 31, 1917	Agents of Bank of Montreal, N. Y.	do do	500.
Sept. 1, 1917	do do do	do do	350.
		Total, so far discovered	$27,295.

There are probably other fraudulent cheques of the same kind, as his defalcations in respect of my funds on deposit with the Guaranty Trust Company of New York apparently amount to nearly $40,000.

I will send you the cheques above described for your inspection, if you so desire.

It seems to me that your Trust Company must have had notice, on the face of each of these transactions, that C. H. Cahan, Jr., purporting to act as my Agent or Attorney, was thereby misappropriating my funds, and applying them to his own
563 personal account at your Trust Company, and, through your Trust Company, paying them out for his own personal debts and liabilities.

What may be the legal results of these transactions, and of your notice of them, what may be my rights and your liabilities under American law, I do not at present really know; but I do feel that you should have notice of all the facts so far ascertained by me.

Moreover, I think that under these circumstances, you should furnish me with a complete statement of my son's account at your Trust Company; and thus enable me to ascertain, if possible, how these funds were subsequently applied by my son's cheques on his personal account; and whether
564 any other persons were involved in these frauds and misappropriations.

The matter is a most distressing one for me, and I am so completely surprised and perplexed, so dazed in mind, and withall so financially embarrassed by these defalcations, that I cannot trust my own judgment as to what the legal rights of the parties are in such a case; but I do sincerely hope that you will give me every assistance in your power to the end that I may ascertain all possible

facts in connection with my son's accounts at your New York Office, and to what extent they represent fraudulent transactions in addition to those hereinabove disclosed.

Yours very truly,

C.H.C./W. (Signed) C. H. CAHAN.

Plaintiff's Exhibit 9.

C. H. CAHAN K.C.
Barrister and Solicitor

Transportation Building
St. James Street

Cables—"Nahac Montreal" 566
Codes—Lieber's
Western Union
Post Office Box 356
Telephone Main 1250

Montreal, Canada.

July 22nd, 1920.

Empire Trust Company,
120 Broadway,
New York City,
U. S. A.

Sirs:

In view of the correspondence which has already passed between us, I understand that you decline 567
to pay over to me the moneys amounting to $31,170.00, representing the proceeds of the twenty one checks, hereinafter described, which were wrongfully drawn upon my bank accounts with the Agents of the Bank of Montreal, in the City of New York, or with the Guaranty Trust Company of New York, by C. H. Cahan, Jr., and wrongfully deposited by him to the credit of his personal and

private account with you and thereby converted by him to his own use, with full notice to you of such misappropriation, viz:—

1. Check, No. 371, dated July 12, 1916, for the sum of $1,000, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

2. Check, No. 387, dated August 1, 1916, for the sum of $5,000 drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

569

3. Check, No. 415, dated September 1, 1916, for the sum of $2,000, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

4. Check, No. 435, dated September 20, 1916, for the sum of $3,500, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to your order.

5. Check, No. 449, dated September 30, 1916, for the sum of $1,000, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to your order.

570

6. Check, No. 456, dated October 13, 1916, for the sum of $670.00, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

7. Check, No. 473, dated November 1, 1916, for the sum of $1,000, drawn upon the Agents of the Bank of Montreal, in the City of New

York, payable to the order of said C. H. Cahan, Jr.

8. Check, No. 495, dated November 17, 1916, for the sum of $1,000, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

9. Check, No. 514, dated November 29th, 1916, for the sum of $1,000, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

572

10. Check, No. 569, dated January 2, 1917, for the sum of $1,000, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

11. Check, dated January 3, 1917, for the sum of $3,000, drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to your order.

12. Check, dated January 13, 1917, for the sum of $4,000, drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

573

13. Check, No. 34, dated March 22, 1917, for the sum of $500, drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

14. Check, dated April 12, 1917, for the sum of $500, drawn upon the Guaranty Trust

Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

15. Check, dated May 26, 1917, for the sum of $750, drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

16. Check, dated May 29, 1917, for the sum of $500, drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

575 17. Check, dated July 27, 1917, for the sum of $500, drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

18. Check, No. 39, dated August 20, 1917, for the sum of $1,000, drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr.

19. Check, No. 123, dated August 31, 1917, for the sum of $500, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

576 20. Check, No. 121, dated September 1, 1917, for the sum of $350, drawn upon the Agents of the Bank of Montreal, in the City of New York, payable to the order of said C. H. Cahan, Jr.

21. Check, dated October 15, 1918, for the sum of $2,400, drawn upon the Guaranty Trust Company of New York, in the City of New York, payable to the order of said C. H. Cahan, Jr., or to your order.

To avoid misunderstanding, however, I hereby make formal demand upon you that you pay over to me the proceeds of said twenty one checks, amounting to $31,170.00, with interest, at the rate of 6% per annum, upon the sum of each of the said checks from the date of its deposit with you.

Yours very truly,

C.H.C.W (Signed) C. H. CAHAN.

Plaintiff's Exhibit 10.

[Guaranty Trust Co.] 578

TRANSCRIPT OF LEDGER ACCOUNT
WITH
C. H. CAHAN
P. O. Box 1848 New York City

Date		*Dr.*	*Cr.*	
1915				
Oct. 4	Opened		10,000.00	
" 25		150.00		
Nov. 4		180.26		
" 17		315.00		
Dec. 26	Int. to Dec. 26, 1915		43.38	
1916				
Jan. 26			66,432.74	579
"		5,000.00		
"		100.00		
Apr. 11		1,000.00		
" 28		400.00		
"		21,300.00		
May 12		1,000.00		
" 17		2,000.00		
June 12		5,000.00		
" 26	Int. to June 26, 1916		514.69	

	July 29		1,000.00	
	Aug. 2			2,500.00
	" 26		2,145.00	
	Sept. 1			3,000.00
	" 27		19,400.00	
	" 29		640.00	
	Oct. 3		1,255.79	
	" 4		12,000.00	
	" 5			711.03
	Nov. 1			4,000.00
	" 2		2,502.81	
	" 3		1,255.79	
	" 20		2,000.00	
	" 25		1,000.00	
	Dec. 1			2,500.00
	" 4		3,255.79	
	" 22		240.00	
	" 26	Int. to Dec. 26, 1916		260.57
	" 29		450.00	
	1917			
	Jan. 2			3,500.00
	" 3		3,000.00	
	" 13		4,000.00	
	" 22		500.00	
	Feb. 1			2,500.00
	" 2		794.83	
	" 3			5,000.00
	" 6			2,500.00
	" 7		7,500.00	
	" 8		1,000.00	
	" 19		1,900.00	
	" 24		33.94	
	Mar. 2			3,500.00
	" 16		1,000.00	
	" 22		850.00	
	Apr. 2			2,500.00
	" 12		500.00	
	" 30			2,500.00

May 16		500.00		
" 26		750.00		
" 29		500.00		
" 31		200.00		
June 1		1,000.00		
" 2			2,500.00	
" 26	Int. to June 26, 1917		48.51	
" 30			2,500.00	
July 7		500.00		
" 27		500.00		
" 31		1,000.00		
" 31		2,481.18		
Aug. 1			3,000.00	
" 1		1,008.70		584
" 9		600.00		
" 20		350.00		
" 20		2,000.00		
" 22			4,000.00	
Sept. 17		500.00		
" 22		500.00		
Oct. 1		400.00		
" 3		500.00		
" 8		500.00		
" 11		500.00		
" 17		500.00		
" 22		500.00		
" 23		500.00		
Nov. 4		750.00		585
Nov. 10		225.00		
" 10		750.00		
" 19		250.00		
" 21		250.00		
" 24		250.00		
Dec. 7		1,000.00		
" 26	Int. to Dec. 26, 1917		52.61	

386 *Plaintiff's Exhibits.*

1918				
Jan.	5			5,000.00
"	8		750.00	
"	11		850.00	
"	19		400.00	
Feb.	6		500.00	
Feb.	8		1,000.00	
"	8		500.00	
Mar.	5	Income tax at the rate of 2% on total amount of all interest credited ($101.12) in 1917	2.02	
387				
"	14			5,750.00
"	13		700.00	
"	19		2,500.00	
"	19		500.00	
"	21		2,000.00	
"	23		500.00	
Apr.	15		500.00	
		Interest to June 26, 1918		9.92
Aug.	20			360.00
"	22		350.00	
Sept.	12		6.91	
"	21		2.50	
Oct.	11		50.00	
388 Oct.	14			2,500.00
"	15		2,400.00	
Nov.	7		60.00	
1919				
Feb.	8		30.97	
Mar.	10		125.00	
Apr.	7		.20	
			137,661.69	137,683.45
				137,661.69
		Balance		21.76

Plaintiff's Exhibit 11.

Interest Rate
2½% if over 2,500
2 " " 1,000

C. H. CAHAN JR.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Date	Memo	Dr	Cr	Balance	Days	Aggregate	Amount Delayed Beyond One Day	Interest
1915								
Sept 29	New a/c							
	A		2,500	2,500				
30		719.52		1,780.48			25	
		1,500		3,280.48	1	17		
Oct. 2			75	3,355.48	2	23	1	
4			150	3,465.48	2	33	4	
	185 cash	25		3,440.48				
5		959.60	510	3,950.48	1	43	3	
			400					
	600 Canada		900	5,250.48			4	
	A	825		4,425.48			9	
6		415		4,010.48	1	48		
				50.88				
	A		492.88	543.76			5	
7		415.11		128.65	1	49		
	Cash	500						
			450	78.65	1	50		
	Cash	94						
13			50	29.65				
		105						
	160 cash		560	484.65				
	A	435		49.65			4	
16		21		28.65				
19		387.50						
	375 Canada		412.50	53.65	1	51	4	
19	1,000 cc	25		28.65				
20	500 cash		1,350	1,378.65			11	
	A	304.01		1,074.64				
	A	695.89		378.75	1	55		
21		314.92		63.83	2	57		
22			130	193.83			2	
23		10		183.83	2	61		
25		90		93.83	1	62	72	
26		250						
			325	168.83	2	4	3	
27		350						
	Cash		355	173.83				
	A	150		23.83				
29			50	73.83	3	9	1	
30			450	523.83			1	
Nov 2	400 cash	405.15		118.68	1	10		
4		170.00						
	15 cash		90	38.68			1	
5			50	88.68			1	
	51 cash		106	194.68			1	
		90.15		104.53				
	A	50		54.53	1	11		
6			100	154.53			2	
		67.50		87.03	2	13		
8			118	205.03			1	
		30		175.03				
	A	115		60.03	1	14		
9			325	385.03			3	

Interest Rate
2½% if over 2,500
2 " " 1,000

C. H. CAHAN Jr.
IN ACCOUNT WITH EMPIRE TRUST COMPANY

Date	Memo.	Dr.	Cr.	Balance	Days	Aggregate	Amount Delayed Beyond One Day	Interest
1915								
Nov 9	Forward			385.03		14	14	
		49.61		335.42				
		278		57.42	1	15		
10		30		27.42				
12	Cash		44	71.42				
		50		21.42				
15	31 cash		58.84	80.26				
		60		20.26				
16			50	70.26	1	16	1	
17			225	295.26			2	
	A	215		80.26	1	17		
18		65		15.26				
19	Cash		55	70.26			1	
		60		10.26				
	Cert		1,000	1,010.26	1	27	10	
20	A	1,000		10.26				
22	Cash		20					
			190				2	
	Cash		70	290.26				
		55		235.26	1	29		
23		4.96		230.30	1	31		
24		205		25.30				
	Cash		150					
	Cash		177	352.30				
	A	303.01		49.29	2	31	30	
26	110 cash	50	360	359.29			3	
	A	200						
	A	102.01		57.28				
27		14		43.28				
29	25 cash	200						
	CC 300		225	68.28	1	1	3	
30		50		18.28				
	Cash		25	43.28				
Dec 4	Cash		50	93.28				
		30		63.28	2	3		
6		31		32.28				
7	40 cash	35	160	157.28			1	
	CC		500	657.28			5	
		500		157.28	1	5		
8		10		147.28				
	CC		579.58	725.86			4	
	A	505						
		75		145.86	1	6		
9		29.23		116.63				
		550		*433.37				
			488.19	54.82	2	8	5	
11	30 cash		63.10	117.92			23	
		65		52.92	3	11		
13	Ck retd							
14	Cost ret check	50		52.42				

Plaintiff's Exhibits.

Interest Rate
2½% if over 2,500
2 " " 1,000

C. H. CAHAN JR.
IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo	Date	Dr	Cr	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1915							
Forward	Dec. 14			12 42		11	61	
Acc on Z-			2,000				17	
Cash			30					
Cash			20					
Acc		701 63		1,400 79	1	25		
	15	76 75		1,324 04				
Acc		266 06		1,057 98	1	36		
	16	800		257 98	1	39		
	17	75		182 98	1	41		
	18	42		140 98	2	43		
	20	72 10		68 88	1	44		
	21	29 96		38 92	5	44	23	
Cash	26			38 92				
	27		60	98 92	1	1		
	28	100						
Cash			100	98 92	3	4		
	31	42 50		56 42				
Cash			45	101 42	3	7		
	1916							
Cash	Jan 3		60	161 42				
		50		111 42				
Cert ck			606	717 42				
Acc		500		217 42	1	9	6	
	4	180 50		36 92				
CC			280	316 92			3	
		80		236 92	1	11		
	5	20		216 92	1	13		
	6	20		196 92				
10 Cash 2 000 CC			2,050				20	
		2,000		246 92	2	17		
	8		290	536 92			6	
		320		216 92	2	21		
	10	80 55		136 37	1	22		
Cash	11	128		58 37				
Cash			50	108 37	1	23		
Acc Z 80	12		556 23	664 60	1	30	6	
Cash	13		75	739 60				
		160		579 60	1	36		
	14	502 50		77 10				
Cash			50	127 10	3	39		
Cash	17	135	60	52 10	3	42		
CC	20		200	252 10	2	48	2	
	22	175		77 10				
Cash			80	157 10	2	52		
	24	74 61		82 49	1	53		
	25	75		7 49				
Cash			75	82 49	1	54	43	
CC	26		5,100	5,182 49			51	
Acc		800		4,382 49	1	44		
	27	776 60		3,605 89	1	80		
Bkg Exp.	28	1		3,604 89				
CC			150	3,754 89				

Interest Rate
2% if over 1,000

C. H. CAHAN Jr.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr	Cr	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1916							
Forward	Jan. 28			3,754.89		80	53	
2 Accs		3,570.00		184.89	1	82		
	29	6.48		178.41	3	88		
	Feb. 1		40.	218.41	1	90		
	2	2.29		216.12				
CC			600.	816.12	1	98	6	
	3	2.72		813.40	2	114		
	5	250.		563.40	2	126		
	7	280.50		282.90				
Cash			40.	322.90				
Cash			50.	372.90	1	130		
Cash	8		65.	437.90				
		192.		245.90	1	132		
	9	112.11		133.79	5	137		
	14	133.						
Cash			170.	168.79	1	139		
	15	165.		3.79				
Cash			200.	203.79	1	141		
	16	200.		3.79				
Cash			164.	167.79	1	143		
Cash	17		200.	367.79				
		120.		247.79	1	145		
	18	165.		82.79				
Cash			500.	582.79				
Cash			100.	682.79				
		500.		182.79	1	147		
Cash	19		50.	232.79	2	151		
	21	254.10						
Cash			171.	149.69	2	153		
	23	175.						
Cash			185.	159.69	1	155		
Cash	24	175.	370.	354.69				
Acc		160.		194.69	2	159	59	
	26	23.		171.69	2	4		
	28	4.88		166.81				
Cash			25.	191.81		6		
	29	165.		26.81				
Cash			230.	256.81				
CC			1,827.	2,083.81	1	27	18	
	Mar. 1	5.		2,078.81				
Acc		556.23						
		564.00		958.58	1	37		
	2	292.35		666.23	1	44		
	3	51.		615.23	1	50		
	4	143.70		471.53	2	60		
	6	230.		241.53				
Cash			1,430.	1,671.53	1	77		
	7	95.		1,576.53				
Cash			30.	1,606.53	1	93		
	8	73.37		1,533.16				
Acc		1,000.		533.16				

Plaintiff's Exhibits.

Interest Rate 2% if over 1,000

C. H. CAHAN JR.
IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1936							
Forward	Mar. 8					93		
				531.16				
Cash	9	406.25		124.91	1	98	18	
			75.	199.91	1	100		
Cash	10	96.50		103.41				
			100.	203.41	3	106		
Cash	13	155.50		47.91				
			100.	147.91				
CC		1,500.						
			1,500.	147.91	1	107	15	
CC	14	156.25						
Cash			225.	216.66	2	111		
CC	16		20.	236.66				
			525.	761.66				
CC		500.		261.66	1	114		
Ac	17		1,000.	1,261.66			10	
		1,000.		261.66	1	117	83	
	18	17.		244.66				
		25.		219.66				
		125.		94.66				
			105.	199.66	2	121		
Cash	20	152.49		47.17				
			100.	147.17	1	122		
Cash	21	170.						
			231.17	208.34	2	126		
Coll	23	183.		25.34				
			993.43					
		575.					10	
	25	5.25		443.77	2	134		
	26			438.52	1	138	53	
	27	266.70		171.82	1	4		
	28	150.		21.82	1	6		
Cash			205.	226.82	1	8		
Cash	29	280.	200.	146.82	1	9		
	30	25.		121.82	2	11		
Ca Ck	Apl. 1		2,700.	2,821.82			54	
		75.		2,746.82	2	65		
	3	1,500.		1,246.82				
		500.		746.82	1	72		
	4	372.		374.82				
Cash			20.	394.82	1	76		
Cash	5	80.60		314.22				
			50.	364.22	1	80		
	6	200.		164.22	1	82		
	7	18.		146.22	2	84		
	8	145.		1.22				
Cash			C 150.	151.22	2	88		
	10		70.	221.22	1	90		
Cash	11	125.		96.22				
			50.	146.22	1	91		
Cash	12	10.25		135.97				
	13		125.	260.97	1	94		
	14	6.30		254.67				

Interest Rate
2% if over 1,000

C. H. CAHAN Jr.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr	Cr	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1916					94		
Forward	Apl. 14			254.67	1	97	54	
	15		50. C	304.67				
		170.		134.67	2	99		
Cash	17		170.	304.67	1	102		
Cash	18		80.	384.67				
		197.		187.67				
50 Cash			49.50	237.17	1	104		
Cash	19		500.	737.17				
		190.		547.17	1	109		
	20	271.		276.17				
		33.75		242.42	1	111		
	21	150.		92.42	1	112		
	22	8.95		83.47	4	116	54	
Cash	26		115.	198.47				
B. P.	28	1.			2	4		
		103.45		94.99				
			C 107.	201.99	1	6		
	29	13.40		188.59	3	10		
	May 1	51.10		137.49				
Cash			35.	172.49	2	14		
	3	54.90		117.59				
Cash			140.	257.59	1	17		
	4	40.		217.59	2	21		
	6	45.		172.59	2	25		
	8	31.		141.59	1	26		
	9	118.70		22.89				
Cash			90.	112.89	2	28		
Cash	11		60.	172.89	1	30		
Cash	12		175.	347.89				
		103.20		244.69				
			25.	269.69	1	33		
	13		100.	369.69				
		208.		161.69	2	37		
	15	100.		61.69				
Cash			110.	171.69				
		1,000.						
CC			1,500.	671.69	1	44	15	
	16	90.		581.69				
		.50		581.19				
		86.		495.19	1	49		
	17	442.		53.19	1	50		
	18	24.		29.19				
			50. C	79.19	1	51		
	19	5.25		73.94				
			50. C	122.94	3	54		
	22	30.		92.94				
			40. C	132.94	1	55		
	23	79.		53.94				
			75. C	128.94	1	56		
	24	65.		63.94				
			50. C	113.94	1	57		
	25	99.08		14.86				

Interest Rate 2% on 1,000

C. H. CAHAN JR.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo	Date	Dr	Cr		Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1916								
Forward	May 24				24.86				
	25		25.		49.86				
a/c	26	150.	500.		399.86	1	4	5	
	27	170.50			229.36	2	8		
	29	30.			199.36				
		1.			198.36	2	18		
	31	75.			123.36				
Cr.			205.		328.36			2	
			4,975.		5,303.36			3	
		10.			5,293.36	1	65	57	
	June 1	300.			4,993.36	1	115		
	2	50.			4,943.36	1	104		
	3	3,401.60			1,541.76				
		5.			1,536.76				
		105.60			1,431.16	2	192		
	5	114.			1,317.16	1	205		
	6	1,054.			263.16	2	208		
	7	100.			163.16				
	7	50.			113.16	2	210		
	9	30.			83.16				
	10	4.			79.16				
	12	75.			4.16				
	13	50.			3.66				
			60.		63.66				
		50.			13.66				
			100.		113.66	3	213		
	16	75.			38.66				
	19		80.		118.66				
		23.75			94.91				
	20	45.			49.91				
	21	1.60			48.31				
	24	30.			18.31	2	213	57	
	26		350.		368.31	1		4	
		34.			334.31	1	3		
	27	125.			209.31				
		3.60			205.71	1	5		
	28	99.45			106.26	1	6		
	29	10.			96.26	2	8		
	July 1	15.			81.26	2	10		
	3	42.			39.26				
			100.	C	139.26	2	12		
	5	105.55			33.71				
		50.	800.	C	783.71	1	30		
	6	452.			331.71				
			500.	C	831.71				
		500.			331.71	4	32		
	10	150.60			181.11	1	34		
	11		70.	C	251.11				
		150.			101.11		35		
a/c	12		1,000.		1,101.11	1	46	10	
	13		25.	C	1,126.11				
		20.			1,106.11				

Interest Rate

C. H. CAHAN Jr.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.		Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1916								
	July 13				1,106.11	1	57		
	14	18.21			1,087.90				
			35.	C	1,122.90	1	67		
	15	1,000.							
		16.60			106.30				
			50.	C	156.30	2	71		
	17	55.			101.30				
	18	186.50							
			260.		174.80	1	73		
	19	20.			154.80	1	75		
	20	85.			69.80				
			100.	C	169.80	1	77		
	21	50.			119.80	1	78		
	22	7.			112.80	2	80		
	24	42.90			69.90	7	82		
	26		50.	C	119.90	1	1		
	27	35.			84.90				
B. P.		1.			83.90				
			70.	C	153.90	1	3		
	28	83.92			69.98	1	4		
	29		50.	C	119.98				
		70.			49.98				
a/c			5,000.		5,049.98				
Acc		2,500.			2,549.98	5	129		
	Aug. 3	1,100.			1,449.98				
		40.			1,409.98	1	143		
	4	100.			1,309.98	1	156		
	5	100.			1,209.98	2	180		
	7	35.			1,174.98				
		1,037.92			137.06	1	181		
	8	15.			122.06	1	192		
	9	6.65			115.41	1	183		
	10	3.			112.41				
	11	95.			17.41				
			150.	C	167.41				
		20.			147.41	4	187		
	15	50.			97.41				
			80.		177.41	1	189		
	16	100.			77.41				
			50.	C	127.41	3	192		
	19	75.			52.41	2	194		
	21	25.			27.41				
			20.		57.41	1	195		
	23		50.		107.41				
T.		1.61			105.80	1	196		
	23	2.88			102.92	3	199		
	Aug. 26		350.		452.92	2	10		
	28	15.			437.92	1	14		
	29	186.70			251.22	1	17		
	30	103.75			147.47	2	19		
	Sept. 1	300.	2,000.		1,847.47				

Interest Rate
2% if over 1,000

C. H. CAHAN JR.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.		Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1916								
	Sept. 1				1,847.47				
	2	20.			1,827.47	3	73		
	5	823.			1,004.47				
			100.						
			525.	C	1,629.47	1	89		
	6	1,458.			171.47	2	93		
	8		225.	C	396.47	1	97		
	9	175.			221.47	2	101		
	11	20.			201.47				
			50.	C	251.47	1	104		
	12	15.			236.47	1	106		
	13	6.40			230.07	2	112		
	15	20.			210.07	1	114		
	16	38.75			171.32				
		5			166.32	2	118		
	18	50.75			115.57	1	119		
	19	18.			97.57	1	120		
	20	30.			67.57				
			Certf.						
			3,500.		3,567.57	1	156		
	21	1,000.			2,567.57	1	182		
	22	8.25			2,559.32				
		1,000.			1,559.32	1	198		
	23	353.12			1,206.20	2	222		
	25	1,010.			196.20				
ash			100.		296.20	1	225	20	
	26	106.			190.20				
ash			60.		250.20	1	3		
	27	70.			180.20	1	5		
	28	60.			120.20	2	7		
	30		1,000.		1,120.20	3	40	10	
	Oct. 3	173.50			946.70	1	49		
	4	780.			166.70				
ash			360.		526.70	1	54		
	5	354.			172.70	1	56		
	6	65.			107.70				
ash			50.		157.70	4	64		
	10	6.25			151.45	3	7		
ash	13		70.		161.45				
			670.		891.45	1	79	7	
	14	32.			859.45	2	97		
	16	150.30			709.15				
ash			80.		789.15	1	103		
	17	17.50			771.65	1	113		
	18	577.25			194.40	2	117		
	20	77.			117.40				
			120.		237.40	1	119		
	21	3.20			234.20	2	123		
	23	60.50			173.70	1	125		
	24	25.			148.70				
ah			90.		238.70	1	127		
	25	118.			120.70	1	128	17	
	26		30.		150.70				

Interest Rate
2% if over 1,000

C. H. CAHAN Jr.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1916							
Forward	Oct. 26			150.70	1	2		
Cash	27		25.	175.70	3	8		
B/P	30	1		174.70				
		20		154.70				
Cash			95.	249.70	1	10		
	31	110.50		139.20	1	11		
	Nov 1	20		159.				
Cash			150.					
40 cash 1,000 c/c			1,050.	1,339	1	24	10	
	2	1,050		289	1	27		
	3	100		189				
Cash			60.	249.	1	29		
Cash	4		60.	309.				
		139.23		170.75	2	33		
Cash	6		75.	245.75	2	37		
Cash	8		200.	445.75				
		92.70		353.05	1	41		
Cash	9		50.	403.05				
		130.		273.05	1	44		
	10	60.		213.05	1	46		
	11	34.55		178.50	2	50		
	13	7		171.70	1	52		
Cash	14		90.	261.65				
		58.85		102.85	1	54		
	15	25.		107.85	3	60		
	18	75.		92.85	2	62		
C/C	20		1,000.	1,092.85	1	73	10	
	21	46.		1,046.85	1	83	20	
	22	519.75		527.10	1	88		
	23	260.		267.10	3	97	20	
	Nov 26			267.10	1	3		
Cash	27		140.	407.10	1	7		
	28	12		395.10				
Cash			1,000.	1,395.10	1	21		
	29	75.		1,320.10				
B/P		1		1,319.10				
C/C			1,000.	2,319.10			20	
		1,000.		1,319.10	2	47		
	Dec. 1	25.		1,294.10	1	60		
	2		200. C.	1,494.10				
		910.50		683.60	2	74		
	4	250.		433.60	1	78		
	5	313.16		120.44				
Cash			50.	170.44	1	80		
	6	15.90		154.54	1	92		
	7	8		146.54				
Cash			140.	286.54	1	85		
	8	20.27		266.27	1	88		
	9	112		154.27	2	92		
	11	15.		139.27	1	93		
Cash	12		50.	189.27				

Plaintiff's Exhibits.

Interest Rate
2% if over 1,000

C. H. CAHAN Jr.
IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1916					93		
Forward	Dec. 12			189.57	1	95	20	
	13	6.50		183.07				
Cash			50	233.07	1	97		
	14	52.50		180.57	1	99		
Cert	15		500	680.57			5	
Acc		400		280.57	1	102		
	16	50		230.57				
Acc		25.12		205.45	2	106		
Cash	18		25	230.45	1	108		
	19	79.50		150.95				
Cash			50	200.95	1	110		
	20	5.12		195.83				
Cash			80	275.83				
Acc		46.34		229.49	1	112		
	21	40.62		188.87				
Cash			100	288.87	1	115		
	22	30		258.87	1	118		
	23		500	758.87			15	
		7.40		751.47				
					3	132	15	
	Dec. 26		250	1,001.47	1	10		
	27	292.50		708.97	1	17		
B/P	28	1		707.97	1	24		
	29	504.22		203.75	1	16		
	30	29.35		174.40	3	25		
	1917							
C/C	Jan. 2		1,000	1,174.40		32		
		139.16		1,035.24	1	42		
	3	586.		449.24				
C/C			3,000	3,449.24	1	76	20	
	4	103.80		3,345.44	1	109		
	5	5		3,340.44	1	142		
	6	1,575.		1,765.44	2	178		
	8	345		1,420.44	1	192		
	9	4.85		1,415.59	1	206		
	10	1,012		403.59	3	218		
	13		4,000	4,403.59	3	350	80	
	16	50		4,353.59	1	394	110	
	17	35		4,318.59				
Acc		4,000		318.59	1	397		
	18	5		313.59	5	412		
	23	25		288.59	1	415	40	
C/C	24		4,000	4,288.59	2	501	150	351
	26	2,511.90		1,776.69	1	18		
	27	6.08		1,770.61				
	27	100.		1,670.61	2	52		
	29	1,303.37		367.24	1	56		
	30	136.50		230.74	4	64		
Cert	Feb. 3		5,000	5,230.74			100	
A		5,000		230.74	2	68		
C/C	5		4,521.90	4,752.64			45	

Interest Rate
2% if over 1,000

C. H. CAHAN Jr.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1917					68		
Forward	Feb. 5			4,752.64	1	110	145	351
	6	100.		4,652.64				
		75.						
Acc		2,500.		2,077.64	1	137		
	7	8.47		2,069.17	1	158		
	8	313.27		1,755.90	2	194		
	10	510.		1,245.90	6	266		
	16	113.60		1,132.30				
		100.		1,032.30	1	276		
	17	330.		682.30	3	297		
	20	8.25		674.05	1	304		
	21	125.		549.05	2	314		
	23	155.		394.05	1	318		
	24	102.		292.05	2	334	145	
	Feb. 26	112.		180.05				
			90 C	270.05	1	3		
	27	51.35		218.70				
			100 C	318.70	1	6		
	28	39.64		279.06				
Cash			100.	379.06	2	14		
	Mar. 2	850.		29.06				
			994.50	1,023.56			1—	
				321.56	1	19		
	3	9.37		314.19	2	29		
	5	15.		499.19	1	34		
	6	80.		419.19				
		100.		319.19	1	37		
Coll	7		497.50	816.69	1	45	5	
	9	94.		722.69				
		150.		582.69	3	57		
	10	300.		276.69	2	63		
	13	50.		226.69	1	65		
	13	46.85		179.84	1	67		
Cash	14		100.	279.84	2	73		
	16	100.		179.84	1	75		
	17		50.	229.84				
		100.		129.84	2	77		
	19	125.		4.84				
	20	35.50						
Cash		100.	30.					
Cash			200.	99.34	2	79		
	22	20.		79.34				
Cert			500.	579.34			1	
		50.		529.34	1	84		
	23	315.		214.34				
		100.		114.34	1	85		
A. S. Fleming	24		50.	164.34				351
Int.		100.		64.34	2	87	20	
Cash	26		100.	164.34	1	2		
	27	75.		89.34				

Interest Rate
2% if over 1,000

C. H. CAHAN JR.
IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo	Date	Dr.	Cr.	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1917							
Forward	Mar. 27			89.34		2		351
Cash			100.	189.34				
		90.		99.34	1	3		
	28	31.35		67.99				
Cash			200.					
Cash			200.	467.99	1	8		
	29	50.		417.99a	2	16		
Acc	31	300.						
		33.60		284.39	2	22		
	Apr. 2	150.		134.39	3	25		
	5	14.		120.39				
Cash			40	160.39	1	27		
Cash	6		35	195.39				
	7	.50			1	29		
		100.		94.89	2	31		
	9	41.67		53.22				
Cash			100.					
			.50	153.72	1	33		
L.	10	73.84		79.88				
	10		40	119.88	1	34		
	11	50.		69.88				
Cash			81.50	151.38	1	36		
	12	56.		95.38				
Cert			500	595.38			5	
		400.		195.38	1	38		
Cash	13		37.	232.38				
		37.		195.38	3	44		
	16	15.		180.38	2	48		
	18	15.		165.38				
Cash			57.	222.38	1	50		
	19	100.		122.38				
Cash			40.	162.38	2	54		
	21	51.		111.38	3	57		
Cash	24		60.	171.38	1	59		
	25	57.50		113.88	1	60	5	
	26	15.		98.88				
Cash			900.	998.88	1	10		
R/P	27	1.		997.88				
		400.		597.88	3	28		
	30	25.		572.88				
		75.		497.88	3	43		
	May 3	3.92		493.96				
		70.		423.96	1	47		
	4	217.50		206.46	4	55		
Cash	8		40.	246.46				
		121.08		125.38	2	57		
Cash	10		225.	350.38	1	61		
	11	235.		115.38	1	62		
	12	40.		75.38	3	65		
	15	45.		30.38				
Cash			50.	80.38	2	67		
Cash	17		500.	580.38				

Interest Rate
2% if over 1,000

C. H. CAHAN Jr.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.	Balance	Days	Aggregate	Interest Delayed	Net Aggregate	
	1917					67		551	
Forward	May 17			580.38	1	73	5		
	18	504.67		75.71	1	74			
	19		200. C	275.71	2	80			
	21	55.50		220.21	2	84			
	23	25.		195.21	1	86			
	24	110.		85.21					
Cash			75.	160.21					
		64.27		95.94	2	88		351	
C/C	26		750.	845.94			8		
		210.		635.94	2	12			
B/P	28	1.		634.94					
		180.		454.94	1	17			
	29	410.		44.94					
C/C			500.	544.94	2	27	10		
	31	65.		479.94	1	32			
	June 1	101.50		378.44					
345 Cash C/C 555			900.	1,278.44			6		
		300.		978.44	1	42			
C/C	2		1,500.	2,478.44			3—		
		270.		2,208.44					
		1,307.50		700.94	3	56			
	4	50.		650.94	1	63			
	5	15.49		635.45	1	69			
	6	14.05		621.40	1	75			
	7	287.45		333.95	2	79			
	9		100.	333.95	2	85			
	11	32.50		301.45	1	94			
	14	40.44		261.01	1	97			
	15	27		234.01					
Cash			500	734.01	1	104			
Cash	16		200	934.01					
		500.		434.01	1	116			
	19	200.		234.01					
		50.		184.01	1	117			
	20	7.50		176.51	1	119			
	21	24		152.51	1	121			
	22	350.							
Cash			500.	302.51	4	133	54	551	197
	23	172.37		130.14					
Cash			500.	630.14					
		200.		430.14					
	26	19.50		411.64					
		119.30		292.34	1	3			
	27	50.		242.34	1	5			
B/P	28	1.		241.34					
Interest to 25th inc.			1.90	243.28	1	7			
	29	40.		203.28	1	9			
Cash	30		1,000.	1,203.28					
		85.		1,179.28	2	33			
	July 2	50.		1,129.28	1	44			
	3	340.		789.28					

Interest Rate
2% if over 1,000

C. H. CAHAN Jr.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1917					44		
Forward	July 3			788.26				
Cash			300	1,088.26	2	66		
	5	535.98		552.28				
		56.		496.28	1	71		
	6	250.		246.28	1	73		
	7	72.21		174.07	3	79		
	10	7.50		166.57				
Cash			50.	216.57	2	83		
	12	50.		166.57	1	85		
	13	9.		157.57	1	87		
	14	2.		155.57	2	91		
	16	71.		84.57				
Cash			100	184.57	1	101		
	17	100.		84.57				
Cash			100	184.57	1	103		
	18	100.		84.57	2	105		
Cash	20		200	284.57	1	108		
	21	5		279.57	2	114		
	23	100.		179.57	3	120		
	26	29.		150.57				
Cash	26		60.	210.57	1	2		
	27	25.		185.57				
C/C			500	685.57			5	
		150.		535.57	1	7		
	28	30.		505.57	2	17		
	30	10.25		495.32	1	22		
	31	12.		483.32				
B P		1.		482.32	1	27		
	Aug 1	35.		447.32				
Cash			700	1,147.32				
Cert		32.58		1,114.74	1	38		
	2	640.		474.74	1	43		
	3	60.		414.74				
Cash			225	639.74				
		75.		564.74	3	61		
	6	175.		389.74				
Cash			250	639.74	1	67		
	7	188.25		451.49	1	72		
	8	179.11		272.38	1	75		
	9	10.35		262.03				
Cash			50	312.03	1	78		
	10	30.		282.03	1	81		
	11	55.		227.03	2	85		
	12	17.20		209.83				
Cash			100	309.83				
		50.		259.83	1	88		
	14	60.		199.83	1	90		
	15	52.36		147.47	1	91		
	16	35.		112.47	4	95		
C/C	20		1,000	1,112.47			1	
		25.12		1,087.35	1	106		
	21	150.		937.35	1	115		
	22	287.16		650.19				

Interest Rate
2% if over 1,000

C. H. CAHAN Jr.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1917					115	15	
Forward	Aug. 22			650.19	2	129		
	24	285.		365.19	1	133		
	25	10.80		354.39	1	137	15	
					2	8		
	28	46.		308.39				
		10.		298.39	2	14		
T	30	1.		297.39	1	17		
	31	50.		247.39	1	19		
	Sept. 1		500.	747.39	3	40	15	
	4	52.		695.39				
			350.	1,045.39	1	50	4	
	5	15.		1,030.39	1	65		
	6	572.90		457.49	1	69		
	7	50.		407.49	1	69		
	8	294.60		112.89	2	71		
	10	6.		106.89	1	72		
	11	26.		80.89	1	73		
	12	9.69		71.20	7	80		
	19	20.		51.20	1	81		
	20	6.17		45.03		81	19	
	26			45.03				
B/P	27	1.		44.03				
	Oct. 10	.81		43.22				
	26			43.22				
B/P	29	2.		41.22				
Cash	Nov. 10		1,000.	1,041.22	2	20		
	12	25.		1,016.22	1	30		
	13	500.		516.22	1	35		
	14	153.15		260.97	1	39		
	15	293.60		65.47				
Cash			100.	165.47	1	41		
	16	100.		65.47	1	42		
	17	35.		30.47				
	19	1.66		28.81	7	42		
	26	20.		8.81				
B/P	28	1.		7.81				
	30	1.		6.81				
B/P	Dec. 27	2.		4.81				
	1918							
	Mar. 14	1.50		3.31				
	16	.80		2.51				
B/P	29	2.		0.51				
Cash	Apr. 22		1,005.	1,005.51	1	10		
	23	500.		505.51	3	25		
	24	500.		5.51				
	26			5.51				
B/B	30	2.		3.51				
	May 20	200.						
Cash			250.	53.51	1	19		

Subject to regular charges

Interest Rate
2% if over 1,000

C. H. CAHAN JR.

IN ACCOUNT WITH EMPIRE TRUST COMPANY

Memo.	Date	Dr.	Cr.	Balance	Days	Aggregate	Interest Delayed	Net Aggregate
	1918							
Forward	May 20			53.51		12		
			206.	259.51	2	18		
						19		
	22	200.		59.51	1	22		
	23	36.50		23.01				
	30			23.01				
T	31	2.		21.01				
	June 22	15.00		6.01				
	26			6.01				
T	28	2		4.01				
	July 26			4.01				
	Aug. 26			4.01	8			
	Sept. 3		620.	624.01				
	5	18.		606.01				
	6	100.		506.01				
		.50		505.51				
	12	500		5.51				
	26							
	Oct. 10		50.	55.51			1	
	15	50.		5.51		5		
	15		2,400.00	2,405.51			24	
	15			2,405.51	2	48		
	17	2,300.		105.51	1	49		
	18	25.		80.51	6	55		
	24	10.		70.51	1	56		
	25	15.		55.51	1	57	25	
	26			55.51	3	3		
	29	1.		54.51	9	12		
	Nov. 7		60.	114.51	9	21	1	
	16	50.		64.51				
	22	20.		44.51				
	26							
B.P	27	1		43.51				
	Dec. 16	20.		23.51				
	26			23.51				
	1919							
	Jan. 13	20.		3.51				
	26							

2% if over 1,000

EMPIRE TRUST COMPANY, N. Y.

Name—C. H. CAHAN Jr.

Address—P. O. Box 555, Montreal, Canada.

Date	Checks	Date	Deposits	Int. Delay	Previous Balance	Aggregate	Date	Balance
							May 3	2.51
Jun 4	1,000.00	Jun 3	1,110.00		2.51		Jun 3	1,112.51
Jun 5	100.00				1,112.51	1.10	Jun 4	112.51
Jun 27	100.00	Jun 21	150.00	30	112.51	1.20	Jun 5	62.51
Jul 2	50.00				12.51		Jun 21	162.51
Jul 7	36.50	Jun 28	150.00	30	162.51	20	Jun 27	62.51
Jul 8	20.00				62.51		Jun 28	182.51
Jul 9	20.00				182.51	1.00	Jul 2	82.51
Aug 4	36.41				82.51	1.50	Jul 7	67.01
Aug 6					67.01	1.60	Jul 8	46.41
					46.41		Jul 9	26.41
					26.41		Aug 4	0

Plaintiff's Exhibit 12.

643

C. H. CAHAN JUNIOR
120 Broadway—G. P. O. Box 1848
New York City.

June 16th, 1916.

Empire Trust Company,
120 Broadway,
New York City.

Dear Sirs:

I am enclosing herewith a note of Mr. Edward L. Doucette, of the Hamilton Apartment, 114th Street & Riverside Drive, New York City, for $1092.50, which is due and payable on June 20th at the Liberty National Bank with interest at the rate of 6% per annum. 644

Will you please put this through for collection, and if same is not paid, have the same protested.

Yours very truly,

CHC Jr/AR (Signed) C. H. CAHAN, Jr.
Enc–1

Plaintiff's Exhibit 13.

August 3, 1916.

Mr. C. H. Cahan, Jr.,
c/o Canadian Car & Foundry Company,
120 Broadway,
New York City. 645

Dear Sir:

We are enclosing herewith your cancelled voucher dated July 5th, for Fifty Dollars, which, although charged against your account for the month of July, was not included with the cancelled vouchers returned you for that month.

Apologizing for our oversight, we are—

Very truly yours,

Assistant Secretary.

646 **Plaintiff's Exhibit 14.**

C. H. CAHAN Junior
120 Broadway G. P. O. Box 1848
New York City

August 21, 1916.

The Empire Trust Company,
120 Broadway,
New York City.

Dear Sirs:

I am enclosing herewith a promissory note of
647 Edward L. Doucette, of Hamilton Apartments, 114th Street & Riverside Drive, dated March 20th, 1916, and payable five months from said date at the Liberty National Bank of New York, for $1092.50 plus interest at 6%, in favor of John B. Newman and endorsed by John B. Newman to me.

Will you please have this duly presented for payment, and if payment on the same is refused have it protested, charging your costs in this matter to my account.

Yours very truly,

CHC Jr/AR (Signed) C. H. CAHAN, Jr.
Enc-1

648

Plaintiff's Exhibit 15. 649

C. H. CAHAN JUNIOR
165 Broadway G. P. O. Box 1848
New York City

Aug. 21st, 1917.

Empire Trust Company,
120 Broadway,
New York City.

Dear Sirs:

Please change my address in your books to P. O. Box 555, Montreal, Canada. 650

Yours very truly,

(Sgd) C. H. CAHAN JR.

August 22, 1917.

Mr. C. H. Cahan, Jr.,
P. O. Box 555,
Montreal, Canada.

Dear Sir:

We note from your letter of August 21st that your address has been changed to the above, and shall be guided accordingly. 651

Very truly yours,

Assistant Secretary.

652 **Plaintiff's Exhibit 16.**

Telephone: Main 1250-1251
Offices: 10th Floor Transportation Building

Cables: "Junior," Montreal
Codes: Liebers, Western Union

C. H. CAHAN, JUNIOR, LL.B.
Barrister, Solicitor & Advocate

Member of the Bars of Quebec, Nova Scotia & British Columbia

P. O. Box 555,
Montreal, Canada

August 31st, 1917.

Messrs. Empire Trust Company,
120 Broadway,
New York City, N. Y.

Dear Sirs:

653 Please place enclosed cheque for $500.00 to credit of my account.

Yours very truly,

(Signed) C. H. CAHAN, Jr.

Plaintiff's Exhibit 17.

Telephone: Main 1250-1251
Offices: 10th Floor Transportation Building

Cables: "Junior," Montreal
Codes: Liebers, Western Union

C. H. CAHAN, JUNIOR, LL.B.
Barrister, Solicitor & Advocate

Member of the Bars of Quebec, Nova Scotia & British Columbia

P. O. Box 555,
Montreal, Canada

September 1st, 1917.

654

Messrs. Empire Trust Company,
120 Broadway,
New York, N. Y.

Dear Sirs:

Please deposit the enclosed cheque to credit of my account and oblige,

Yours very truly,

(Signed) C. H. CAHAN, Jr.

Plaintiff's Exhibit 18. 655

Telephone: Main 1250-1251
Offices: 10th Floor Transportation Building

C. H. CAHAN, JUNIOR, LL.B.
Barrister, Solicitor & Advocate

Member of the Bars of Quebec, Nova Scotia & British Columbia

Cables: "Junior," Montreal
Codes: Liebers, Western Union

P. O. Box 555,
Montreal, Canada

Sept. 5th–1917.

The Empire Trust Company,
120 Broadway,
New York City.

Dear Sirs,— 656

Although I wrote you some weeks ago asking you to change my address on your books from General Post Office Box 1848 New York City, to Post Office Box 555 Montreal, yet you sent my cancelled cheques for the month of August to my former address.

Will you please see that my change of address is properly noted.

Yours very truly,

(Sgd) C. H. CAHAN JR.

657

658 *Plaintiff's Exhibits.*

Sept. 6, 1917.

Mr. C. H. Cahan, Jr.,
P. O. Box 555,
Montreal, Canada.

Dear Sir:

In reply to your letter of September 5th, we desire to advise you that due to an oversight your address was not changed on your statement sheet, and your canceled vouchers were sent to your old address.

Proper notation, however, has now been made on
659 our records, and we trust you will have no further cause for complaint.

Apologizing for any annoyance our error may cause you, we are,

Very truly yours,

Assistant Secretary.

Plaintiff's Exhibit 19.

June 25, 1919.

C. H. Cahan, Jr., Esq.,
P. O. Box 555,
Montreal, Canada.

660 Dear Sir:

We regret to have to advise you that your account with us is not meeting our requirements in the matter of average balances maintained, and we would, therefore, thank you to have it transferred elsewhere by the 10th of July.

Yours very truly,

P. H. H.

T. Assistant Secretary.

Plaintiff's Exhibit 20.

661

July 11, 1919.

C. H. Cahan, Jr., Esq.,
P. O. Box 555,
Montreal, Canada.

Dear Sir:

Referring to our recent letter requesting you to transfer your account, it will not be agreeable to us to accept any further deposits. We presume that you will close out the present balance, after determining the amount of outstanding checks.

Yours very truly,

662

P. H. H.
Assistant Secretary.

T

Plaintiff's Exhibit 21.

August 4, 1919.

C. H. Cahan, Jr., Esq.,
P. O. Box 555,
Montreal, Canada.

Dear Sir:

We are enclosing our draft to your order for $26.41, in payment of the amount to your credit in accordance with our recent letter requesting that the account be closed. 663

Yours very truly,

P. H. H.
Assistant Secretary.

T.
Encl.

664 **Plaintiff's Exhibit 22.**

Coleman Du Pont, Chairman of the Board
Le Roy Baldwin, President
Francis Henderson, Vice President
Myron J. Brown, Secretary
Paul H. Hudson, Asst. Secretary
Henry P. Talmadge, Vice President
W. B. Baldwin, Treasurer
Eugene Miller, Asst. Secretary
William J. Hance, Asst. Secretary

William H. English, Vice President
Fred'k L. Eldridge, Vice President
Edward C. Wilson, Asst. Treasurer
Edward A. Lyon, Asst. Secretary
Henry F. Whitney, Asst. Trust Officer

665 **EMPIRE TRUST COMPANY**
Main Office
120 Broadway

Fifth Avenue Office
580 Fifth Avenue

Cable Address
Empire, New York
Londomured, London
Lieber's Code
W. U. Code

W. H. Parker
London Secretary
41 Threadneedle Street
London, E. C.

In replying, refer to EM

New York, Aug. 5, 1920.

Mr. C. H. Cahan, K.C.
Transportation Building,
St. James Street,
Montreal, Canada.

Dear Mr. Cahan:

666 We beg to acknowledge receipt of the formal demand contained in your letter of July 22, 1920, and relating to the account of Mr. C. H. Cahan, Jr. with us.

Very truly yours,

(Sgd) EUGENE MILLER
Assistant Secretary.

G

Address All Communications to the Company

Defendant's Exhibit A.

667

B—4-200M

Please Omit All Dollar Marks.

DEPOSITED IN
EMPIRE TRUST COMPANY
Main Office:
120 BROADWAY

New York, Oct 15 1918

For Account of C. H. Cahan, Jr.

		Dollars	Cents	
Currency				
Checks	c/c 107 W	2400	00	668

(Stamp)

Oct 15 1918
3

Defendant's Exhibit A-1.

(Deposit Slip of Empire Trust Company.)

New York, 9/4/17

For Account of C. H. Cahan, Jr.

		Dollars	Cents	
Currency				669
Checks				
(8)		350	—	
	(4)			

(Stamp)

(Received Stamp)
Sep 4 1917
(rest illegible)

670 **Defendant's Exhibit A-2.**

(Deposit Slip of Empire Trust Company.)

New York, Sep 1–1917

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Check of C. H. Cahan on Bk of Montreal N. Y. City	500	
Currency		
Checks		
(1.5)		

(*Stamp*)

671 Sep 1 1917 4

(and Empire Trust received stamp—partly illegible)

Defendant's Exhibit A-3.

(Deposit Slip of Empire Trust Company.)

New York, Aug 20 1917

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
672 Checks c/c 107	1000	00
(1)		

(*Stamp*)

Aug 20 1917

4

Defendant's Exhibit A-4. 673

(Deposit Slip of Empire Trust Company.)

New York, July 27, 1917.

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks c/c 107 (5)	500.	

(*Stamp*)
Jul 27 1917
3

674

Defendant's Exhibit A-5.

(Deposit Slip of Empire Trust Company.)

New York, 5/29/17

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks Crtfd. c/c 107	500	—

675

(*Stamp*)
May 29 1917
2

676 **Defendant's Exhibit A-6.**

(Deposit Slip of Empire Trust Company.)

New York, May 26/17

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks c/c 107	750	00

(*Stamp*)

Mar 26 1917
2

---

677 **Defendant's Exhibit A-7.**

(Deposit Slip of Empire Trust Company.)

New York, 4/12/17

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks C. C. 107	500	—

(*Stamp*)

Apr 12 1917
3

---

678 **Defendant's Exhibit A-8.**

(Deposit Slip of Empire Trust Company.)

New York, Mr 22/17

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks C. C. 107	500	00

(*Stamp*)

Mar 22 1917
4

Defendant's Exhibit A-9. 679

(Deposit Slip of Empire Trust Company.)

New York, Jan 13 1917

For Account of C. H. Cahan, Jr.

	Dollars Cents
Currency	
Checks	4000 00
own check Cert on 107	

(*Stamp*)

Jan 13 1917
2 g

680

Defendant's Exhibit A-10.

(Deposit Slip of Empire Trust Company.)

New York, Jan 3 1917

For Account of C. H. Cahan, Jr.

	Dollars Cents
Currency	
Checks C. C. 107	3000 00

(*Stamp*)

681

Jan 3 1917
4

682 **Defendant's Exhibit A-11.**

(Deposit Slip of Empire Trust Company.)

New York, Jan 2 1917

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency	1000	00
Checks C. C. (8)		

(Stamp)
Jan 1 1917
1

683

Defendant's Exhibit A-12.

(Deposit Slip of Empire Trust Company.)

New York, Nov 29 1916

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks C. C. (8)	1000	

(Stamp)
684 Nov 29 1916
4

Defendant's Exhibit A-13. 685

(Deposit Slip of Empire Trust Company.)

New York, Nov 20 1916

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks C. C. (8)	1000	00

(*Stamp*)

Nov 20 1916
2

686

Defendant's Exhibit A-14.

(Deposit Slip of Empire Trust Company.)

New York, Nov 1 1916

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency	50	00
Checks Certified Agents Bank of Montreal	1000	00
	1050	00

687

CC (written over "Certified")

(*Stamp*)

Nov 1 1916
2

688 **Defendant's Exhibit A-15.**

(Deposit Slip of Empire Trust Company.)

New York, Oct 13 1916

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks (8) C. Cert.	670	00

(*Stamp*)

Oct 13 1916
6

689

Defendant's Exhibit A-16.

(Deposit Slip of Empire Trust Company.)

New York, Sep 30 1916

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks (8) Certified	1000	00

(*Stamp*)

690 Sep 30 1916
2

Defendant's Exhibit A-17. 691

(Deposit Slip of Empire Trust Company.)

New York, Sep 20 1916

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency (8)	3500	00
Checks Certified		

(*Stamp*)

Sep 20 1916
7

692

Defendant's Exhibit A-18.

(Deposit Slip of Empire Trust Company.)

New York, Sep 1 1916

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
Checks (Certified) (8)	2000	00
Certified		

(*Stamp*) 693

Sep 1 1916
2

694 **Defendant's Exhibit A-19.**

(Deposit Slip of Empire Trust Company.)

New York, Aug 2/16

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency (8)	5000	00
Checks		
Accepted		

O. K.
E. A. L.

695 (*Stamp*)
Aug 2 1916
6

Defendant's Exhibit A-20.

(Deposit Slip of Empire Trust Company.)

New York, Jul 12 1916

For Account of C. H. Cahan, Jr.

	Dollars	Cents
Currency		
696 Checks Certified (8)	1000	00

C.C

(*Stamp*)
Jul 12 2

Defendant's Exhibit C.

697

DEBITS A to E	8/2/16	SHEET 4	
Elkus Gleason & P	1,167.50	1,167.50 d	
C. B. Ellis	60.00		
	3.59	63.59 d	
Empire Kaolin	10.00		
	5.00		
	5.00		
	100.00		
	10.00	130.00 d	
" Safed Ep	8.33		
	8.33	16.66 d	
W E Nhaus	25.00		
	32.50		698
	3.00	60.50 d	
Equitable O/B Corp	200.00		
	833.33	1,033.33 d	
G Ternest	93.59		
	93.59	187.18 d	
Ernet & Cane	114.72	114.73 d	
W M Evarts	2.00	2.00 d	
N Erb	6.78		
	800.00		
	137.65		
	173.37		
	74.50		
	48.00		
	20.25		699
	23.00		
	30.00		
	96.50		
	50.00		
	112.00		
	98.43		
	80.21	1,750.69 d	
		93,080.01 c	
	93,080.01	93,080.01 d	

700 *Defendant's Exhibits.*

	P Abbot	10.00	
		15.17	25.17 d
	J W Adler	75.00	
		200.00	275.00 d
	Alaska Mines Co	200.00	200.00 d
	Am R Fidelity Co	2.00	
		10.00	12.00 d
	Ame Malting Co	5.00	
		200.00	
		16.52	
		13.50	
		6.50	
		24.00	
701		1.00	
		5.00	
		5.00	
		6.50	
		7.50	
		3,641.50	
		2,380.00	6,312.02 d
	Anness & Newman	63.12	
		50.00	
		281.25	
		1,500.00	
		1,710.00	
		1,500.00	5,104.37 d
	M Arnois	10.00	10.00 d
702	E Bacharch	25.00	25.00 d
	L D & A J Baldwin	374.58	374.58 d
	C Baring	100.00	100.00 d
	A B Be Nech	981.50	
		1,518.50	2,500.00 d
	Biograph Co	9.00	
		9.00	
		5.35	
		5,000.00	5,023.35 d

Bishops Ser Co	335.00	335.00 d
L Block	1.76	1.76 d
J A Balancard	890.21	890.21 d
W S Blitz	10.00	10.00 d
E S Booth	10.00	10.00 d
M E Buffington	1,035.50	
	440.00	1,475.50 d
E J Bullwinkel	289.50	289.50 d
H A Caesar C	1,800.00	1,800.00 d
C H Cahan	2,500.00	2,500.00 d
Est J J Canon	50.00	50.00 d
Carmond Kellog & G	175.00	175.00 d
Central News Ser	15.00	15.00 d
B P Cheny	550.00	704
	37.22	587.22 d
S A Clark	15.00	15.00 d
M Cohan	10.00	10.00 d
R R Conklin	3,000.00	
	300.00	3,300.00 d
Costa Rica Mines	680.55	680.55 d
A F Cowen Spl	34.63	34.63 d
C S Crossman Co	100.00	100.00 d

706 **Defendant's Exhibit D.**

CREDITS A to E 8/2/16 SHEET 1

	Alsa Gold Fields Co	55,610.43
	J D Aldridge	1,350.00
	T H Allen	170.00
	J P Allen Co	47.00
	Ame Malying Co	167.99
		6,177.09
	Amer Ore Rec Co	1,068.21
	Amer Process Co	51.00
	Amer Tar & Waz	1,862.68
	Anness & Newman	2,605.25
	J T Angon	500.00
707	B Arnonsn	15.00
	Artillery Fuse Co	12,510.00
	Est A K Hmaschemoore	291.15
	Avery & Whiting	10.00
	Babcock Wilzox C9	10.50
	L W Baldwin	50,000.00
	Est D M Ballon	70.00
	D Bandler	94.00
	W A Barber	1,210.67
	C Baring	130.25
	Barron Trust Co	2.00
	M M Beck Spl	395.00
	J E Bell	250.00
	S T Bell	112.50
708	Bekl Bag Co Inc	754.38
	A B Bennech	1,518.50
		700.00
	C K Benjamin	65.90
		167.22
		11.00
	J D Brekowitz	500.00
	E Berlimer	16.00
	M Bernhart	220.00
	Eme Bernheimer	550.00

G W Betts	1,000.00
Biograph Co	1,828.71
	3,216.56
Est H Bishop	647.50
Bishops Ser Col	287.20
C M Blakley Agt	62.38
A E Blackwood	368.00
Est J A Blachard	890.21
W S Blitz	150.00
	28.00
Wm Block	60.00
Boro Co	197.26
J C Brady	9.00
T E Brown	825.00
F A Bryant	1,000.00
L Bue	1,020.00
M E Buffington	430.00
E A Burke	100.00
W A Burke	125.00
W F Burne Ex Corp	250.00
H A Caesar O	55,029.57
C H Cahan	5,000.00
W Campbell	121.90
Canadan Gold Car	727.71
C Carrington	1,776.57
Est J D Carrol	2,000.00
J B Carter	1,610.39
L Cerf	21.44
H R Chambergs C	482.50
B P Cheny	1,500.00
Childs Co	250.00
R D Chipp	1,250.00
Church S Warren Co	45.00
G A Calrk	578.16
R F "	2,522.03
C A Close Spl	84.40
Comp Sec Dep	5,741.68

710

711

712 *Defendant's Exhibits.*

D W Comsrock	210.33
R R Conklin	50.00
I B Conover	25.76
Con Colar & Co	3,321.61
Cooper Hewott Elect	626.92
A Cordes	100.00
R B Cowing	925.78
Crane & Bullwinkel	289.50
W C Crosby	30.00
Crossman Xo	56.94
C S Crossman Xo	150.00
H Crowe	60.83
R J Calhone	20.80
H K Curtis	83.79
Est T F Cushing	157.50
	970.25
Easters Sec Ser	264.00
F R Eaton	78.75
M V P	25.00
A I Elkus	40.00
Elkus Gleason & P	9,056.31
C E Ellis	10.00
E R Erly	155.00
Empire Safe Dep Co	27.50
Equitable C	

713

714

Defendant's Exhibit E. 715

December 20, 1915.

Mr. C. H. Cahan,
120 Broadway,
New York City.

Dear Sir:

Can you not arrange to maintain with us an average daily free balance of at least $500.00? We make this request owing to the fact that when a client's balance falls below $500.00, the account shows us a loss, instead of a profit.

It is customary for us to reimburse ourselves for losses incurred in this manner, by making a nominal monthly charge as follows: 716

$1.00 a month when balances average between $100.00 and $500.00.

$2.00 a month when balances fall below $100.00.

We hope you will find it convenient to comply with our request to keep your balances up to the required mark, but if they should fall below, shall have to charge your account as above stated, this effective as of January 1916.

Very truly yours,

717

Assistant Secretary.

718 **Statement as to Evidence.**

The foregoing constitutes the testimony and a statement of all the evidence offered upon the trial of this case, and the defendant, Empire Trust Company, and the plaintiff, Charles Hazlitt Cahan, present the foregoing as their bills of exceptions respectively in this case and pray that the same may be settled and allowed and signed and certified by the judge as provided by law.

PARMLY, STETSON & WOODWARD,
Attorneys for Plaintiff-in-Error
and Defendant-in-Error
(Defendant below).

719

HUGHES, ROUNDS, SCHURMAN & DWIGHT,
Attorneys for Defendant-in-Error
and Plaintiff-in-Error
(Plaintiff below).

Stipulation Settling Bills of Exceptions.

IT IS HEREBY STIPULATED that the foregoing are true and correct bills of exceptions and that an order may be entered settling and filing the same as such.

720 Dated, New York, June , 1925.

PARMLY, STETSON & WOODWARD,
Attorneys for Plaintiff-in-Error
and Defendant-in-Error.

HUGHES, ROUNDS, SCHURMAN & DWIGHT,
Attorneys for Defendant-in-Error
and Plaintiff-in-Error.

Order Settling Bills of Exceptions. 721

Upon the foregoing stipulation, the bills of exceptions herein are settled and ordered on file.

Dated, New York, June , 1925.

FRANCIS A. WINSLOW,
U. S. District Judge.

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK. 722

CHARLES HAZLITT CAHAN,
Plaintiff,

vs.

EMPIRE TRUST COMPANY,
Defendant.

APPEARANCES:

ROUNDS, SCHURMAN & DWIGHT, Attorneys for Plaintiff (CHARLES E. HUGHES, JR., and THOMAS L. ENNIS, of Counsel); 723

PARMLY, STETSON & WOODWARD, Attorneys for Defendant (VAN VECHTEN VEEDER, WILLIAM P. ALLEN, WILLIAM L. WOODWARD, of Counsel).

WINSLOW, D. J.:

This action is brought to recover the proceeds of twenty-one checks aggregating $31,170, drawn

on funds of the plaintiff by C. H. Cahan, Jr., and deposited by him with defendant, to Cahan, Jr's. personal account. The checks were drawn during the years 1916, 1917 and 1918, under powers of attorney executed by plaintiff to Cahan, Jr. The drawee banks were the Bank of Montreal (New York) and The Guaranty Trust Company. The proceeds of the checks thus deposited with the defendant were used by Cahan, Jr., for his personal use and benefit, and not for the benefit or account of the plaintiff.

The case has been tried by the Court, and a jury of one, pursuant to stipulation duly entered on 225 the minutes.

Both sides have moved for the direction of a verdict.

The Bank of Montreal and The Guaranty Trust Company, the drawee banks, had no notice that the agent of plaintiff (Cahan, Jr.) intended to misuse the funds withdrawn by the several checks. The form of the checks was such that they might have been properly authorized orders. On the other hand, the defendant herein was charged with the knowledge that the agent was using the checks and their proceeds for his personal use and benefit.

The agent did not in fact have actual authority either to draw these particular checks or to de- 226 posit them to his personal credit with defendant.

Three of the checks involved were drawn to defendant's order. As to these checks defendant was charged with notice, that whatever authority he had to draw them, he was now actually using them for his personal benefit.

Newton v. *Hanson*, 229 Fed. 256.

The form of the checks drawn to the agent's own order imported the ownership of the moneys in the maker—i. e., the plaintiff herein.

Whether the checks were drawn to pay the agent's indebtedness to the defendant (which would seem to be the case in three instances referred to) or whether they were drawn for the purpose of transferring the principal's funds to the agent's personal account—which actually resulted—the defendant is liable whether the theory of the action be for conversion or for money had and received.

Wagner Trading Co. v. Battery Park Natl. Bank, 228 N. Y. 37.

Even if the actual good faith of the defendant be not questioned, the form of the checks should have led the defendant to inquire, in which event the real facts would have come to light. Failure to make this inquiry amounts to "bad faith," in a commercial sense. 728

Rochester & C. T. R. Co. v. Pariour, 164 N. Y. 281, 284.

Sec. 93, N. Y. Negotiable Instruments Law.

The language of the power of attorney herein cannot be construed as giving authority to the agent to use the principal's funds for Cahan, Jr.'s personal use and benefit. The record certainly does not sustain the contention that the defendant was a holder in "due course." Cahan, Jr., unlike a trustee, had no title, and by deposit with defendant, he could not transfer title to defendant. 729

Sec. 91 and Sec. 98, Negotiable Instruments Law.

I am not unmindful of the reasoning of the New York Court of Appeals in *Havana Central R. R.*

Co. v. *Knickerbocker Trust Co.*, 198 N. Y. 423—but I am constrained rather to follow the reasoning of *Havana Central R. R. Co.* v. *Central Trust Co.*, 204 Fed. 546.

The defendant in the case at bar was put on inquiry to inquire not only as to Cahan, Jr.'s authority to draw these particular checks, but also his authority to draw them and use them for his own purposes. In the *Havana Central R. R.* case (204 Fed. 546, at p. 551), the Court said:

> "But if the Bank have knowledge that the officer is using the check for his personal bene-
731 fit, e. g., to pay his debt to the bank or to deposit it to his personal credit, then the bank is put upon inquiry, and if it fail to make it, it pays at its peril."

While the comment of the Circuit Court of Appeals in *Havana Central R. R. Co.* v *Central Trust Co.* (*supra*) disapproving of and departing from the opinion of the Court of Appeals (198 N. Y. 423) is *dictum*, it involved fundamentals necessarily declared and adhered to by the Circuit Court in arriving at its conclusion in the case then under consideration.

Verdict directed for plaintiff for $31,170.

732 December 22, 1924.

FRANCIS A. WINSLOW,
U. S. District Judge.

Petition of Empire Trust Company for Writ of Error. 733

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
Defendant. 734

To the Honorable
Judge of the United States District Court for the Southern District of New York.

And now comes Empire Trust Company, the defendant in the above entitled action, by Messrs. Parmly, Stetson & Woodward, its attorneys, and feeling itself aggrieved by the final judgment of this Court entered against it and in favor of the plaintiff on the 12th day of January, 1925, defendant hereby prays that a Writ of Error may be allowed to it from the United States Circuit Court of Appeals for the Second Circuit to the District Court of the United States for the Southern District of New York, and in connection with this petition the petitioner herewith presents his assignment of error. 735

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the case and that the amount of the security may be fixed by the order allowing the Writ of Error and that upon the giving of such security, all further proceedings in this Court be

736 *Petition of Empire Trust Co. for Writ of Error.*

suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Second Circuit, and your petitioner will ever pray.

PARMLY, STETSON & WOODWARD,
Attorneys for Defendant,
Office & P. O. Address,
#2 Rector Street,
Borough of Manhattan,
New York City.

737

Order Allowing Writ of Error on Behalf of Empire Trust Company.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
738 Defendant.

Let a Writ of Error issue from the United States Circuit Court of Appeals for the Second Circuit to the United States District Court for the Southern District of New York, as prayed for in the petition of the said defendant, and a citation be issued to the said plaintiff.

And it now appearing that a citation has been issued in the cause, it is now ordered that the Writ of Error allowed as above stated, operate as

a supersedeas, and that the defendant furnish a bond in the sum of Thirty-two thousand Dollars, conditioned according to law to be approved by this Court and that upon the filing of the supersedeas given in said amount with good and sufficient surety or sureties so approved, execution upon said judgment to be stayed.

Dated, February 2nd, 1925.

AUGUSTUS N. HAND,
United States District Judge.

A. G. Jr.

740

Assignment of Errors on Behalf of Empire Trust Company.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
Defendant.

741

And now comes the plaintiff-in-error by Messrs. Parmly, Stetson & Woodward, its attorneys, and in connection with its petition for a Writ of Error, says that in the record of proceedings and in the final judgment aforesaid, manifest error has inter-

742 *Assignment of Errors.*

vened to the prejudice of the plaintiff in error (defendant below), to wit:

I. The Court erred in directing a verdict for the plaintiff.

II. The Court erred in directing a verdict for the plaintiff in the sum of Thirty-one Thousand One Hundred Seventy ($31,170) Dollars.

III. The Court erred in not directing a verdict for the defendant.

743 IV. The verdict and judgment are contrary to law.

By reason whereof, plaintiff-in-error prays that the aforesaid may be reversed, etc.

PARMLY, STETSON & WOODWARD,
Attorneys for Plaintiff-in-Error,
(Defendant Below),
No. 2 Rector Street,
Borough of Manhattan,
City of New York.

744

Bond on Writ of Error of Empire Trust Company.

745

DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK
IN THE SECOND CIRCUIT.

CHARLES HAZLITT CAHAN,
Plaintiff-Respondent,

against

EMPIRE TRUST COMPANY,
Defendant-Appellant.

746

KNOW ALL MEN BY THESE PRESENTS, That Empire Trust Company, as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Charles Hazlitt Cahan in the sum of Thirty Two Thousand ($32,000.00) Dollars to be paid to the said Charles Hazlitt Cahan for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents, sealed and dated the 18th day of February, 1925.

747

WHEREAS, the above named Empire Trust Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the Judgment rendered in the above entitled suit, by a Judge of the District Court of the United States for the Southern District of New York.

748 *Bond of Empire Trust Co. on Writ of Error.*

NOW, THEREFORE, the conditions of this obligation is such, that if the above named Empire Trust Company shall prosecute said appeal to effect, and answer all damages and cost if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

EMPIRE TRUST COMPANY,
P. H. HUDSON
(Seal) Vice-President.

NATIONAL SURETY COMPANY,
By S. B. HOUGH
749 (Seal) Resident Vice-President.

Attest:
M. C. MCGRATH
Resident Assistant Secretary.

AFFIDAVIT, ACKNOWLEDGMENT, AND JUSTIFICATION BY GUARANTEE OF SURETY COMPANY.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 18th day of February, 1925, before me personally came S. B. Hough, known to me to be
750 the Res. Vice-President of National Surety Company, the corporation described in and which executed the foregoing bond of Empire Trust Company as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Res. Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has com-

plied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of Empire Trust Company is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Res. Vice-President of said Company, and that he is acquainted with M. C. McGrath and knows him to be the Res. Assistant Secretary of said Company; and that the signature of said M. C. McGrath subscribed to said Bond is in the genuine handwriting of said M. C. McGrath, and was thereto subscribed by order and authority 752
of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Ten Million dollars.

S. B. HOUGH.
(Deponent's Signature.)

Signed; sworn to, and acknowledged before me this 18th day of February, 1925.

M. O'DONNELL,
Notary Public, &c.

753

H. E. EMMETT,
Notary Public for King County No. 29.
Certificate filed in New York County No. 64, Suffolk, Nassau, Bronx No. 9, Queens No. 264, Richmond & Westchester County.
Kings County Register's Office No. 6927.
New York County Register's Office No. 6981.
Bronx County Register's Office No. 2618.
Commission expires March 30, 1926.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 20th day of February, 1925, before me personally came P. H. Hudson, to me known, who, being by me duly sworn, did depose and say that he resides in Upper Montclair, N. J.; that he is the Vice-President of the Empire Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was
755 so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

P. J. DEVLIN,
(Seal) Notary Public,
Bronx Co. 53, Reg. No. 199.
N. Y. Co. Clerk's No. 447, Reg. No. 5329.
Kings Co. Clerk's No. 46, Reg. No. 5181.
Certificate filed Westchester Co.
Commission Expires March 30, 1926.

756

L. 22-266

DISTRICT COURT OF UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

CHARLES HAZLITT CAHAN,
Plaintiff-Respondent,

against

EMPIRE TRUST COMPANY,
Defendant-Appellant. 758

BOND ON APPEAL

Filed Feb. 20, 1925.

SURETY
NATIONAL SURETY COMPANY

PARMLY, STETSON & WOODWARD,
Attorneys for Def. Ap.

759

I approve of the written bond, and of the sufficiency of the surety thereon,

J. W. M.,
C. J.

2/20/25

A. G. Jr.

760 **Citation on Behalf of Empire Trust Company.**

By the Honorable HENRY W. GODDARD, *one of the United States District Judges for the Southern District of New York, in the Second Circuit, to* CHARLES HAZLITT CAHAN, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 3rd day of March, 1925, pursuant to a Writ of Error filed in the Clerk's Office of the District
761 Court of the United States for the Southern District of New York, wherein Empire Trust Company is plaintiff-in-error (defendant below) and you are defendant-in-error (plaintiff below), to show cause, if any there be, why the judgment as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 7th day of February, in the year of our Lord One Thousand Nine Hundred and Twenty-five, and of the Independence of the
762 United States the One Hundred and Forty-ninth.

HENRY W. GODDARD,
United States District Judge for the Southern District of New York, in the Second Circuit.

A. G. Jr.

Petition of Charles Hazlitt Cahan for Writ of Error.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
Defendant.

To the Honorable Judge of the United States District Court for the Southern District of New York:

And now comes Charles Hazlitt Cahan, the plaintiff in the above-entitled action, by Messrs. Reynolds, Schurman & Dwight, his attorneys, and feeling himself aggrieved by the final judgment of this Court entered on the 12th day of January, 1925, against Empire Trust Company and in favor of the said Charles Hazlitt Cahan, in so far as the said judgment denied to the said Charles Hazlitt Cahan interest on the amounts of the checks as demanded in the complaint, hereby prays that a writ of error may be allowed to him from the United States Circuit Court of Appeals for the Second Circuit to the District Court of the United States for the Southern District of New York, and in connection with this petition petitioner hereby presents his assignment of errors.

256 *Petition of Charles H. Cahan for Writ of Error*

Petitioner further prays that an order may be entered herein allowing the said writ of error and that the amount of the security to be given by plaintiff may be fixed by the said order.

Dated, New York, March 11, 1925.

HOTCHKISS, SCHURMAN & DWIGHT,
Attorneys for Plaintiff,
Office and P. O. Address:
100 Broadway,
Borough of Manhattan,
City of New York.

257

Order Allowing Writ of Error on Behalf of Charles Hazlitt Cahan.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
Defendant.

260

Let a writ of error issue from the United States Circuit Court of Appeals for the Second Circuit to the United States District Court for the Southern District of New York, as prayed for in the petition of the said plaintiff, and a citation be issued to the said defendant.

And it now appearing that a citation has been issued in the cause, it is now ordered that the plaintiff furnish a bond in the sum of Two hundred and fifty Dollars ($250) conditioned according to law to be approved by this Court.

Dated, New York, March 11, 1925.

JNO. C. KNOX,
U. S. District Judge.

A. G., Jr.

770

Assignment of Errors on Behalf of Charles Haslitt Cahan.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES HASLITT CAHAN,
Plaintiff,

against

EMPIRE TRUST COMPANY,
Defendant. 771

And now comes the plaintiff in the above-entitled cause, by Messrs. Rounds, Schurman & Dwight, his attorneys, and in connection with his petition for a writ of error says that in the record, proceedings and in the final judgment aforesaid manifest error

778 *Bond of Charles Hazlitt Cahan on Writ of Error.*

Cahan, plaintiff, and Empire Trust Company, defendant, a judgment was rendered against the said Empire Trust Company and in favor of said Charles Hazlitt Cahan for Thirty-one Thousand Two Hundred Seventy-nine Dollars and nine cents ($31,279.09) and costs, which said amount did not include interest on the amounts of the checks as demanded in the complaint, and the said Charles Hazlitt Cahan having obtained a writ of error from the United States Circuit Court of Appeals for the Second Circuit to correct the judgment in the aforesaid suit to the inclusion of interest on
779 the amount of the checks as demanded in the complaint.

NOW, THEREFORE, the condition of this obligation is such that if the said Charles Hazlitt Cahan shall prosecute his writ of error to effect, and will pay the amount of damages and costs of the said appeal if he fail to make his plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

Sealed and delivered
in presence of

CHARLES HAZLITT CAHAN (Seal)

780

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICAN,
By F. G. MERRILL,
Resident Vice-President.

Attest:

HELEN GOODWIN,
Resident Assistant Secretary.

DOMINION OF CANADA,
PROVINCE OF QUEBEC,
CITY OF MONTREAL, } ss.:

On this twenty-eighth day of February, 1925, before me personally came Charles Hazlitt Cahan, to me known and known to me to be the person described in and who executed the foregoing instrument and he duly acknowledged that he executed the same.

W. B. S. REDDY, B. C. L.

(Notarial Seal)

782

INDEMNITY INSURANCE COMPANY OF NORTH AMERICAN.

AFFIDAVIT, ACKNOWLEDGMENT AND JUSTIFICATION BY GUARANTEE OF SURETY COMPANY.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On this 21st day of February, one thousand nine hundred and 25, before me personally came F. G. Merrill, known to me to be the Resident Vice-President of the Indemnity Insurance Company of North America, the corporation described in and which executed the within and foregoing Bond of Charles Hazlitt Cahan as a surety thereon, and who, being 783
by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said Indemnity Insurance Company of North America is duly and legally incorporated under the laws of the State of Pennsylvania; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal

affixed to the within Bond of Charles Hazlitt Cahan is the corporate seal of said Indemnity Insurance Company of North America, and was thereto affixed by the order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with Helen Goodwin and knows her to be the Resident Assistant Secretary of said Company; that the signature of said Helen Goodwin subscribed to said Bond is in the genuine handwriting of said Helen Goodwin, and was thereto
785 subscribed by order and authority of said Board of Directors; and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution, exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million Five Hundred Thousand ($1,500,000) Dollars.

That C. W. Lewis is the agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

F. G. MERRILL.
(Deponent's Signature.)

Sworn to, acknowledged before me, and sub-
786 scribed in my presence this 21st day of February, 1925.

CHARLES J. KOCH,

(Officer's Signature, description and seal)
Notary Public, for Kings County, No. 54.
Certificate filed in New York Co. No. 122, Bronx No. 24, Queens No. 133, Richmond & Westchester Counties.
Kings County Register's Office No. 6065.
New York County Register's Office No. 6163.
Bronx County Register's Office No. 2665.
My commission expires March 30, 1926.

Citation on Writ of Error on Behalf of Charles Hazlitt Cahan. 787

By the Honorable John C. Knox, one of the United States District Judges for the Southern District of New York, in the Second Circuit, to EMPIRE TRUST COMPANY, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 10th day of April, 1925, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of 788
New York, wherein Charles Hazlitt Cahan is plaintiff-in-error (plaintiff below) and you are defendant-in-error (defendant below), to show cause, if any there be, why the judgment as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 11th day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-five, and of the Independence of the United States the One Hundred and Forty-ninth. 789

JNO. C. KNOX,
United States District Judge for the Southern District of New York, in the Second Circuit.

790 **Stipulation.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff-in-Error
and Defendant-in-Error,

against

EMPIRE TRUST COMPANY,
Defendant-in-Error
791 and Plaintiff-in-Error.

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said described Court in the above-entitled matter as agreed on by the parties, and the whole thereof.

Dated, June , 1925.

PARMLY, STETSON & WOODWARD,
Attorneys for Plaintiff-in-Error
and Defendant-in-Error.

HUGHES, ROUNDS, SCHURMAN & DWIGHT,
792 Attorneys for Defendant-in-Error
and Plaintiff-in-Error

Clerk's Certificate.

793

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES HAZLITT CAHAN,
Plaintiff-in-Error
and Defendant-in-Error,

against

EMPIRE TRUST COMPANY,
Defendant-in-Error
and Plaintiff-in-Error.

794

I, ALEX. GILCHRIST, JR., Clerk of the District Court of the United States for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a true transcript of the record of the said District Court in the above-entitled cause as agreed upon by stipulation between the attorneys for the respective parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this day of June, in the year of our Lord one thousand nine hundred and twenty-five and of the independence of the United States the one hundred and forty-ninth.

795

(Seal)

ALEX. GILCHRIST, JR.,
Clerk.

Opinion of Circuit Court of Appeals.

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

CHARLES HAZLITT CAHAN,
Plaintiff and
Defendant-in-Error,

against

EMPIRE TRUST COMPANY,
Defendant and
Plaintiff-in-Error.

Before:

Hon. CHARLES M. HOUGH,
Hon. LEARNED HAND,
Hon. JULIAN W. MACK,
Circuit Judges.

Appearances:

CHARLES E. HUGHES, JR., for Plaintiff.
VAN VECHTEN VEEDER, for Defendant.

Cross writs of error to judgment directed for plaintiff in the District Court for the Southern District of New York.

For his own convenience entirely, plaintiff gave to his son, a man of mature years, powers of attorney to make, sign, endorse, deposit, draw and deliver cheques and other orders for the payment of money on two New York City banks in which he had deposit accounts. The son, before any such power of attorney given, had a bank account of his own in the same city and with

defendant, Empire Trust Company.

About two months after power of attorney given him, the son began to draw the series of twenty-one cheques which are the basis of this action. Each* of these twenty-one cheques was signed "C. H. Cahan, by C. H. Cahan, Jr., his attorney."

Most of the cheques were drawn to the order of himself, but some to that of Empire Trust Company; all were deposited by Cahan, Jr., in that company to the credit of his personal account, and all bear, and bore when presented to the drawee banks, endorsements showing that defendant had received them from C. H. Cahan, Jr. All but two cheques had been certified or accepted by the drawee-bank when and as drawn, *i.e.*, before deposit by Cahan, Jr.

Plaintiff, Cahan, Sr., more than a year after the last of the twenty-one cheques had been drawn, deposited and paid, ascertained that by means thereof, $31,170 had been transferred from his two aforesaid personal accounts to Cahan, Jr.'s personal account in defendant bank, and been expended for unknown purposes, but for no purpose beneficial to or known to plaintiff, and certainly not to pay any indebtedness of Cahan, Jr., to defendant, as Empire Trust never loaned any money to that depositor.

This action at law was brought after demand and refusal, and the complaint stated plaintiff's position thus:

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* There is no direct evidence of the way in which the last of the series, dated Oct. 15, 1918, was signed or endorsed, nor is the check produced; but that such cheque existed and was used like the others is not questioned by defendant's assignments of error, so we pass the matter.

Cahan, Jr., had no "power or authority" to draw cheques for the purpose of appropriating to himself and his personal uses the funds of plaintiff. The twenty-one cheques specified were drawn by Cahan, Jr., "in breach of his trust as attorney" for plaintiff. Defendant at the request of Cahan, Jr., had "without the authority or knowledge of plaintiff wrongfully placed the said twenty-one cheques" to the credit of the "personal and private account" of Cahan, Jr., and "permitted" him to appropriate the proceeds of the same, although when said cheques were so deposited "the defendant had full notice of said wrongful and fraudulent acts of" Cahan, Jr., and "knew" that its depositor in using proceeds of such cheques in his private account with defendant "was thereby wrongfully and fraudulently and in breach of his said trust misappropriating and converting plaintiff's property to his own use"; wherefore, in doing and permitting to be done what we have above set forth, defendant "knowingly participated" in Cahan, Jr.'s "wrongful and fraudulent misappropriation and conversion" of plaintiff's property.

Defendant went to trial on the general issue, and the facts appearing as above, both sides moved for a directed verdict. The Court below gave direction for plaintiff, and for the total of the cheques, $31,170, but refused interest except from date of verdict.

Whereupon plaintiff brought a writ, assigning for error failure to grant interest from the respective dates of collection of the twenty-one cheques, and defendant took out a writ because

verdict had not been directed in its favor.

HOUGH, *C. J.*:

We have not summarized all the evidence given, but have stated the only facts we deem material; they are also clearly proven.

This material evidence proves that defendant received without comment or question, collected and credited to Cahan, Jr., and permitted him to use the proceeds of twenty-one cheques on their face showing that the depositor as a fiduciary, *i. e.*, an attorney in fact, had drawn his principal's money for the purpose of transferring it to his own credit and for his own use in defendant's bank.

This evidence must of course be measured by and with the pleadings. The complaint alleges that what Cahan, Jr., did was a "conversion," *i. e.*, a wrongful misappropriation of his principal's money; and further, that what defendant did aided the attorney's fraud and amounted to participation therein. The asserted legal analogy is that both the actual doer of wrong and his accessory therein are both liable, and it is not necessary that both should profit by the wrong (*Longfellow* v. *Lewis*, 2 Hask. 258; F. C. 8487).

Admittedly defendant knew nothing of what its depositor Cahan, Jr., was doing except as information was given by the cheques he offered for deposit; wherefore, the record presents this bald legal question: is an agent's bank of deposit put on

notice by, and does it take at its peril if it receives without investigation, a cheque drawn by the agent on his principal's funds to his own order and tendered for the credit of his private account?

This question has been thoroughly apprehended by counsel, yet in treating it we cannot but think that they have juggled somewhat with the word *authority* as modified by the adjectives *actual* and *apparent*. Definition is always dangerous, for by derivation it pretends to speak the last word, to be final, which is usually impossible. For the purposes of this case, however, *actual* authority may safely be taken to mean what sundry civil codes (notably that of California) say it means, viz.: the power which "a principal intentionally confers upon the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess."

As thus described Cahen, *Jr.*, could never have believed that he had *actual* authority to use his father's money for his own purposes, while his apparent authority is not expanded by any evidence before us. He was apparently no more than he was actually, one who by written power was authorized to deal with the deposits in the drawee banks for his principal's uses and purposes. But he had both actual and apparent authority to draw the twenty-one cheques, and the misappropriation of which he was undoubtedly guilty lay not in the drawing of the cheques but in what he did with them.

In considering the mass of case law discussed we shall, so far as possible, avoid decisions dealing with defalcations by executors and trustees who had title to the funds they misapplied; we shall regard primarily cases arising out of acts by agents like Fulton, *Jr.*, or officers of corporations, both of whom act by possession and have no title to the funds with which they deal. We do not assert that the legal principles involved in these two classes of wrongdoing are basically different; we but seek to avoid unnecessary prolixity.

We likewise lay aside the class of cases of which *Bland v. City Trust Co.*, 192 N. Y. 63, is an example, wherein a defendant received from an agent a cheque of an belonging to his principal in payment of the agent's indebtedness to the defendant. Again we do not deny that the principles involved in such cases are in some ways analogous to the case in hand, but the facts at bar do not render such decisions especially apt and the field of citation must be kept as small as possible.

Circumscribing now that the trial court *directed* a verdict, our question may be thus restated: Did the act of defendant in collecting for the personal account of its depositor cheques drawn by that depositor as agent of another against his principal's funds constitute as matter of law an assistance to the depositor in an unlawful appropriation of that principal's funds?

The holding below substantially asserts that the evidence was such that the law could only be satisfied by a direction, and

that the misappropriation was complete when the money was collected and deposited to Cuhan, Jr.'s credit.

Technical or formal criticism can be made of these holdings. It may be urged that since admittedly there was nothing *per se* wrong in drawing cheques to Cuhan, Jr.'s order, it is illogical to find a *tort* in carrying out the order contained in the lawfully drawn cheque; and it is also a rather attractive criticism to say that if an agent has his principal's money either in his pocket or in his own bank account, and applies it in cash or by his own cheque to his principal's business, there is no wrong, and therefore no actionable tort; for there is no such thing as a contingent wrong. The formal answer may be that *injuria* is complete when the agent puts his principal's money where his principal did not intend it to be or wish his agent to put it, but *damnum* did not arise until actual wrongful expenditure.

Forms and formality are important. The difficulties of modern courts are largely due to modern ignorance of form; but form cannot be made as important as substantive law, and the underlying question here is whether there is or is not the judge-made business safeguard against dishonesty asserted by this court in *Hercana, etc.* v. *Central, etc.*, 284 Fed. 546, at 548, to be substantially as follows: if an agent's bank receives for deposit to the personal credit of the agent cheques drawn by the agent to his own order on the principal's funds, that bank is

by the cheques themselves charged with notice that the agent is wrongfully applying the principal's money to his own use, and if said bank fails to make inquiry it is liable to the principal for an ensuing fraudulent appropriation to his own use by the agent.

We took this rule in substance from *Havana, &c. v. Knickerbocker*, 135 A. D. 313, and approved it, although the judgment of the Appellate Division had already been reversed in 198 N. Y. 422. Since we perceive no legal difference between the position of the fiscal officer of a corporation who draws against corporate funds cheques to his own order, and puts them to the credit of his private account, and that of Cahan, Jr., in this case, we shall assume that the Havana litigation in the State Court was exactly like the present cause, and the Havana case in this Court was in legal substance an action by Cahan, Sr., against his own (the drawee) banks.

When in 1909 the Appellate Division decided the Havana case, the dissenters, per Scott, J., said that the judgment seemed to them "to extend the responsibility of persons dealing with trustees not only beyond anything that has yet been judicially decided, but also beyond *practicable* limits."

Whether there was such complete paucity of decision will be considered later. The real question to be decided, for it underlies the rule, is whether such rule does or does not unduly hamper the business of bankers and the commercial interchange of

goods. The matter in final analysis is a matter of business convenience, rather than of morals.

The problem was certainly not solved in the New York court of last resort in 198 N. Y. 422; for the judgment of the Appellate Division was reversed, not on the ground that there was no such rule as had been laid down below, but because, conceding the rule *arguendo*, the duty of inquiry was fulfilled by presenting the agent's cheques on his principal's funds to the bank containing them; and if that bank, being the agent of its depositor for that purpose, paid the cheque, it thereby affirmed that the cheque was properly drawn and should be paid according to its tenor and endorsements. Then the court intimated (perhaps somewhat faintly) that if the drawee bank made a mistake in its representations as agent as aforesaid, it would be responsible therefor.

In *Whiting* v. *Hudson, etc. Co.*, 234 N. Y. 394, the question was again presented but avoided by attributing to the certification of checks an effect of which we are unable, after much deliberation, to approve. In commenting on the decision in the Havana case, the Court admitted that "there may be technically inaccuracy in describing the drawee bank as the depositor's agent for the purpose of making representations as to the fiduciary's powers. The relation is one not of agency but of debtor and creditor"—which is exactly the position taken concerning that decision by this court when the wronged principal in the Havana case, acting perhaps too hastily on the hint of the Court of Appeals,

sued in the United States Court his own bank, alleging (as *per* suggestion) that it made a mistake in substantially saying that the cheques were "all right" by paying them.

We regard the certification of the cheques on Cahan, Sr.'s accounts as not controlling and are unable to agree with the reasoning of the Whiting case for the following reason. Let it be admitted as true (p. 404) that "the legal result (of certification) is the same as if (Cahan, Jr.) had received the cash over the counter and * * * between the drawee bank and its depositor (the present plaintiff) the cheques had been paid"; it remains true that this action, or any similar one, would have lain just as well if Cahan, Jr., had actually drawn the cash and deposited the same with defendant but had then cotemporaneously informed defendant that he had drawn the money from his father's account by virtue of his letter of attorney and now wished it to go to his personal credit and be available for his personal use.

This action depends for success not on what the drawee banks *did* but on what the unfaithful agent's bank (the present defendant) *knew;* it makes no difference whether the knowledge came from the face, form and contents of the checks tendered for deposit or from any other authoritative and convincing source.

The net result of the Havana cases in terms of the present litigation is that the New York Court held that Cahan, Sr., should not prevail against Empire Trust Company if his own banks approved the twenty-one cheques by paying them, and this Court held

that Cahan, Sr., could not recover against his own banks because the New York decision [illegible] erroneous and said banks did nothing of the [illegible]; they merely paid drafts which the drawer had a right to make, and were not concerned with what the drawer did with the proceeds.

We could not have come to the conclusion announced in 204 Fed. without holding the decision in 198 N. Y. erroneous; therefore the decision cannot be called *obiter*, as is asserted by defendant.

But even if thought *obiter*, it is an *obiter* of the same kind as the famous one in *Marbury* v. *Madison;* and plainly a mature expression of opinion by the full bench of this Court, which we can hardly condemn as a *dictum* (*Cameron* v. *United States*, 250 Fed. 943). We must either follow or overrule it.

It is not quite true, as said by the dissent in 113 A. D., that no similar rule had ever been judicially enforced. In *Anderson* v. *Kissam*, 35 Fed. 699, Wallace, J., in 1888, following as he asserted earlier decisions in the State Courts, held that it was sufficient evidence of conversion that an agent's bankers had credited to the private account of that agent cheques which on their face were the property of his principal, which is substantially the rule contended for here; and what was in effect the same ruling was applied in the Ninth Circuit in *Farmers, etc. Co.* v. *Fidelity Co.*, 86 Fed. 541. While more recently the Eighth Circuit, in *Oklahoma Bank* v. *Galion, etc. Co.*, 4 F. 2d, 337, declared it as well settled that

> "when a bank with knowledge that its funds belonged to the principal and not the agent, which was apparent from the face of the (checks), permits him to (withdraw the money) it is liable to the principal for the moneys thus deposited and withdrawn by the agent on his individual check and by him converted to his own use"—

unless facts appear justifying the payment which did not appear in the case cited and do not in the case at bar.

Further, in *Duckett* v. *National, etc. Bank*, 86 Md. 400, an agent (p. 986) deposited to his own account a cheque which on its face belonged to a trust of which the depositor was the trustee, and the Court said:

> "Knowing that the money was not (the depositors) but that it was payable to him and to be deposited to his credit as trustee, the bank had no authority to place it to his individual credit."

It may be noted, that in this case legal title was in the payee as trustee, but despite this the general ruling above quoted was announced.

More recently in *Bank of Hickory* v. *McPherson*, 102 Miss. 852, where an official who had no title received a cheque which on its face showed that it belonged to him in his representative capacity and not individually and the bank credited the proceeds thereof to him individually, the bank was held liable for what the Court rightly called "an unlawful application," *i. e.*, the payment of his private debts.

Again, in *United States, etc. Co.* v. *Peoples' Bank*, 127 Tenn. 720, a guardian did the same thing and the bank which

permitted him to do so was held liable because it had notice of its depositor's position, conveyed by the cheque itself.

It is true that the foregoing cases, as well as the English ones to be cited, nowhere state the rule in the compendious and far-reaching form in which it was put by Noyes, J., in 204 Fed. But they all show (as indeed do the New York cases) that the question is one of degree. It is never doubted that if a bank of deposit has notice which would lead that fiction of the law a "reasonable man" to suspect wrong, the bank which fails either to verify or dispel that suspicion is responsible for the results.

Consequently the question in this case, as in the Havana cases, is always, not whether there was notice of something, but whether there was *sufficient* notice in and by the face, form and contents of the cheque tendered for deposit.

In the English cases, *Ex parte Darlington, etc.*, 4 DeG. J. & S. 581; *John* v. *Dodwell*, (1918) A. C. 563, and *Ross* v. *London, etc. Bank*, (1919) 1 K. B. 678, it is not asserted that the piece of negotiable paper tendered for deposit and collection was in and of itself, and by its form, sufficient notice to incite the receiving bank to action and investigation at its own peril, although in the Ross case at least there was no notice given, or indeed possible, other than the form of the cheques deposited, which were, however, of an unusual character, *i. e.*, they were obviously drawn for purposes probably foreign to any use that the depositor could lawfully make of funds derived from them.

But in the most recent English case, *Underwood, Ltd.* v. *Bank of Liverpool,* (1924) 1 K. B. 775, a corporate officer tendered for deposit in his personal account cheques which were on their face property of the corporation, endorsed by him officially for the credit of his personal account. Without investigation the bank received these cheques, gave the official personal credit for them and permitted him to dissipate the account. We perceive no difference in legal effect between that case and the one at bar. Scrutton, L. J., disposed of what is the vital question underlying the rule asserted by the plaintiff here and by this Court in the Havana case, by saying:

> "If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customers, the risk of liability because they do not inquire."

This is substantially the same brushing aside of the objection to the practicability of the rule that Wallace, J., used nearly forty years earlier.

Still adhering to an examination of cases in which the wrongdoing depositor had no title to that which he misused, there is undoubtedly authority *contra*, and decisions have not always been apparently consistent. The result reached in *Santa Marina Co.* v. *Canadian Bank*, 254 Fed. 391 (Ninth Circuit), holds that where a corporate officer had authority to endorse cheques belonging to the corporation in blank and he did so endorse and deposit them to his private account, the cheques so endorsed became the property of his bank on being deposited; and in the

form of the cheque the court found absence of timely notice that the depositor had no title to the cheques so deposited. This does not seem to us consistent with the earlier decision of the same court above cited.

Goodwin v. *American National Bank*, 48 Conn. 550, presented questions suggested by this case in several forms, for the wrongdoing depositor was known to the defendant bank through his private account, through an account as Town Treasurer, and as the executor of an estate. The bank permitted him to deposit items which on their face belonged to the town of which he was treasurer and the estate of which he was executor in his private account, and in every instance when his defalcations appeared the bank was exonerated. The town moneys and the estate moneys were treated alike and the *ratio decidendi* is forceably set forth by Pardee, J., at page 568:

> "It might be a wholesome rule if established and understood that any omission by a trustee of the mark of the trust from either the securities or moneys belonging to it even with an honest purpose and for the briefest time, should be notice to all persons having knowledge of such act that a fraud had been accomplished, if thereby the fidelity of trustees could be secured; but when a trustee has broken down all other barriers between himself and fraud we fear that he will not allow a rule of law to restrain him; those for whom he acts must ever find their *protection in his integrity.*"

We are of opinion that, not universally, but in numerous jurisdictions, and especially in the courts of the United States and those of England, a rule which Pardee, J., thought *might* be well, has been announced and enforced.

In the case of agents acting by procuration, if there be no such rule, if for instance an attorney in fact can as such attorney not only withdraw his principal's funds from one bank, as he plainly has a right to do, but deposit them in another (or even perhaps in the same bank) to his own credit without any responsibility on the part of the bank accepting such deposit, a principal who gives a power of attorney, a private corporation which gives usual powers to its financial officer, a municipality which can only act through its elected or appointed officers is left without any remedy except that which the Connecticut Court thinks is all that the law gives, *i. e.*, the integrity of its fiduciary.

At bottom the question here depends upon whether the form of such drafts as those at bar gives clear enough notice that the agent is not acting in the principal's interest. There are indeed cases in which it might be in the principal's interest for the agent to withdraw funds from the principal's account and deposit them in his own account, even in a bank of the same city or in the same bank. The only case we can think of is one in which the agent wanted to conceal his principal's name in a transaction in which even a cashier's cheque might excite suspicion. But the payment of the agent's own debt might in fact be a part of such a transaction, and that possibility does not seem to us sufficient justification. We must balance probabilities and conclude that we hold the form of the cheque should be taken as evidence that the agent is engaged upon ventures of his own, and

as to his authority to conduct the same, the bank must assume the risk of investigation.

This Court once decided to adopt and enforce the rule announced in the Havana case. It is a hard rule as business is ordinarily conducted, not only in the financial institutions of a populous and busy city, but perhaps even more so in smaller communities where men are more widely known by reputation and are more influenced by personal reputations than can be expected in the crowds of a cosmopolis.

We feel acutely the disadvantage of continuing to differ with the highest Court of New York; yet the treatment in that state of the Havana case in 198 N. Y. may be noted. It has been cited twice, first in *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, at 113, a case involving the wrongdoing of an executor, and cited to show that

> "although the depositor is drawing checks which the bank may surmise or suspect are for his personal benefit, it is bound to presume in the absence of adequate notice to the contrary that they are properly and lawfully drawn. Adequate notice may come from circumstances which reasonably support the sole inference that misappropriation is intended as well as directed."

The inference is that the Havana case held that the mere presentation of a cheque that might possibly be misused was not by reason of the possibility "adequate notice." The statement of law may be admitted, but that was not the point of decision by the Court of Appeals in 198 N. Y.

It was again cited in *Whiting* v. *Hudson Trust Co.*, *supra*,

where the inaccuracy of the reasoning of Bartlett, J., in 198 N. Y. was substantially admitted, but a re-discussion of the matter was avoided by attributing to certification of cheques a result with which as above shown we are unable to agree; the question is always one of *notice*, and we cannot agree that notice may not be given as well by a certified cheque as by one uncertified. It may be given, as we have shown above, by word of mouth. Certification is among other things a guaranty that the cheque is drawn by proper authority against sufficient funds; it is not a guaranty of the identity or authority of the payee. How it can be treated as enabling the recipient thereof to shut his eyes to everything also written on the cheque form we are quite unable to perceive.

It seems to us that the exact doctrine of the Havana case (in 198 N. Y.), its essential holding, and the reason for the result reached has, while not rejected in form, been substantially disaffirmed by the very court that pronounced it. The treatment of the decision by the lower courts of 198 N. Y. is perhaps unimportant but interesting. It was practically disregarded in *Egre v. Coal, etc. Bank*, 208 A. D. 646, at 653, and perusal of other cases in the same court subsequent to the date of 198 N. Y. will confirm the impression that New York has been far from enforcing the doctrine laid down in the decision we still cannot follow.

Our examination of authority, assisted and guided by very able briefs, has led to the conclusion that upon authority there is no reason to depart from the body of law formulated by

Negus, J., in 201 Fed. The reason for the rule is one of public policy; and, as usual, arguments for both sides may be and have been persuasively presented. Studious consistency and exposition, a liking for that which is "practicable" rather than that which is burdensomely elaborate, lead to the result somewhat plainly set forth by Platts, J., supra; while a desire to yield that measure of assistance which the law reasonably attempts to give to the victims of misplaced confidence lead to such statements of public policy as have been made by Swanson, L. J., and Walton, J. Upon the whole, we still incline to the latter view, and adhere to that view of law and public policy set forth in our previous decision under which direction of verdict for plaintiff was clearly right.

There remains the question of interest upon the verdict. On this point we adhere sufficiently to the announcements made by us in *Singleton v. Phoenix, etc. Co.*, 139 Fed. 280, and *Bennett v. Bigelow*, 283 Fed. 368, to the effect that in deciding causes arising within the State of New York we grant interest in accordance with the rules deducible from the decisions of New York.

This is in form an action for conversion, and when the amount of damages is, as here, a mere matter of computation from facts undisputed, the New York rule is not doubted, interest is a matter of right (*Thomas v. Dean*, 61 N. Y. 91, 96), affirmed 171 N. Y. 666). It follows that the Court below erred in not granting interest on the several items represented by the checks one charges from the dates when they were respectively credited by

defendant to Cahan, Jr. This error may be corrected by remitting the case under plaintiff's writ of error to the Court below with directions to amend the verdict in accordance with this opinion (*Speelman* v. *Iowa, etc. Ass'n*, 4 F. 2d, 501, at 504).

IT IS ORDERED: That the defendant's writ of error be dismissed, and that upon plaintiff's writ of error the judgment be remitted to the Court below for modification as required by this opinion. Plaintiff will recover one bill of costs in this Court.

Decided January 4, 1926.

Order for Mandate.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 11th day of January, one thousand nine hundred and twenty-six.

Present:

Hon. CHARLES M. HOUGH,
Hon. LEARNED HAND,
Hon. JULIAN W. MACK,
Circuit Judges.

CHARLES HASLITT CAHAN,
Plaintiff-in-Error,
Defendant-in-Error,

v.

EMPIRE TRUST COMPANY,
Defendant-in-Error,
Plaintiff-in-Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the defendant's writ of error be and it hereby is dismissed, and that upon plaintiff's writ of error the judgment be remitted to the court below for modification as directed by the opinion of this court, with one bill of costs to plaintiff in this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H.
L. H.

Clerk's Certificate.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 287, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

Charles Haslitt Cahan,
Plaintiff in Error,
Defendant in Error,

against

Empire Trust Company,
Defendant in Error,
Plaintiff in Error,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of
(Seal) February, in the year of our Lord One Thousand Nine Hundred and Twenty-six and of the Independence of the United States the One Hundred and Fiftieth.

WM. PARKIN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[redacted]

Supreme Court of the United States

[redacted]

No. 1[redacted] 318

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Supreme Court of the United States

EMPIRE TRUST COMPANY, Petitioner-Defendant, against CHARLES HAZLITT CAHAN, Respondent-Plaintiff.	October Term, 1925. No.

Sirs:

PLEASE TAKE NOTICE that the annexed petition for a writ of *certiorari* will be presented to the Supreme Court of the United States on Monday, March , 1926.

Dated, New York, March , 1926.

VAN VECHTEN VEEDER,

WILLIAM LEE WOODWARD,

Counsel for Petitioner.

To:

HUGHES, ROUNDS, SCHURMAN & DWIGHT, Esqs.,
Counsel for Respondent.

Supreme Court of the United States

EMPIRE TRUST COMPANY, Petitioner-Defendant, against	October Term, 1925.
CHARLES HAZLITT CAHAN, Respondent-Plaintiff.	No.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Empire Trust Company, a New York corporation, respectfully shows:

I.

Statement of the Issue.

FIRST: This is a petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York in favor of the plaintiff in an action at law.

SECOND: The plaintiff sued to recover the proceeds of twenty-one checks, aggregating $31,170, drawn by plaintiff's son, Charles H. Cahan, Jr., on funds of the plaintiff on deposit in the Guaranty Trust Company and with the Agents of the Bank of Montreal, both in the City of New York, under powers of attorney to said Cahan, Jr., executed by the plaintiff. The checks which (save in two instances) were certified by the banks on which they were drawn, were deposited by Cahan, Jr., to the credit of his personal account in the Empire Trust Company, the defendant, and the proceeds were thereafter drawn by him and used for purposes unknown to the plaintiff.

THIRD: The issue, as stated by the Court below, is:

> "Admittedly defendant knew nothing of what its depositor Cahan, Jr., was doing except as information was given by the cheques he offered for deposit; wherefore, the record presents this bald legal question: is an agent's bank of deposit put on notice by, and does it take at its peril if it receives without investigation, a check drawn by the agent on his principal's funds to his own order and tendered for the credit of his private account?" (Record, pp. 269-270).

II.

Statement of the Facts.

FOURTH: The plaintiff, a Canadian barrister, was employed during the war in supervising British munition contracts in this country. The magnitude of the work led him to establish his headquarters in New York City in January, 1915, and in May of that year, his son, Charles H. Cahan, Jr., also a Canadian barrister, joined him as an assistant. Father and son lived together, the former

paying the living expenses and direct compensation to the son.

FIFTH: The plaintiff's duties required much travel. He was frequently in England and traveled throughout the United States. In view of his frequent and long continued absence from New York, he gave his son in 1916, broad powers of attorney on personal accounts carried by him in two New York City banks, namely, the Agents of the Bank of Montreal and the Guaranty Trust Company (Record, fols. 466, 481).

SIXTH: The plaintiff's work no longer required residence here after the United States entered the war, and he and his son returned to Montreal in the summer of 1917. Meanwhile, Cahan, Jr., had opened an account of his own in the Empire Trust Company on September 29, 1915. The account is printed in full in the Record, pages 197 to 214. The aggregate deposits to August 4, 1919, when the account was closed, amounted to $70,742.08.

SEVENTH: In December, 1919, the discovery of irregularities in his accounts in Montreal and the disappearance of his son led the plaintiff to inquire about his deposits in the New York banks, to which he had paid no attention after giving his son authority over them (Record, fols. 283, 284). In January, 1920, the plaintiff discovered in his son's safe deposit box in Montreal twenty of the cancelled checks on the Guaranty Trust Company and the Agents of the Bank of Montreal upon which this suit was brought, showing collection thereof by the defendant bank, which apprised him for the first time of the existence of his son's personal account (Record, fols. 133-135).

The face, form and contents of the checks (save one which was not found) are printed in full on pages 163 to

183 of the record. All the checks are signed "C. H. Cahan, by C. H. Cahan, Jr., His Attorney." Seventeen of the twenty-one checks are payable to the order of Cahan, Jr., three to the order of the Empire Trust Company (Plaintiff's Exhibits 5-c, 5-d and 5-j, Record, fols. 496, 499, 517). All the checks, save two (Plaintiff's Exhibits 5-r and 5-s, fols. 541-544), were either certified by the Guaranty Trust Company or accepted by the agents of the Bank of Montreal, according to whether they were drawn on one or the other bank. Thus certified before presentation (Record, fols. 381-388, 394-397), all the checks were deposited by Cahan, Jr., to the credit of his account with the defendant bank. Each deposit was accompanied by a deposit slip (Record, fol. 394), save two (Defendant's Exhibits A-1 and A-2, Record, fols. 668-671) received by mail (Record, fols. 378-380, 652-654), for which deposit slips were made out by defendant's receiving teller.

EIGHTH: The defendant made no loans to Cahan, Jr. (Record, fols. 437, 438), nor did it receive any of the checks in payment of overdrafts. The plaintiff's attempt by cross-examination on the trial (Record, fols. 328-365, 393-420) and on argument in the Court below, to develop a theory of "threatened" overdraft, was ignored by the Court below and need not be discussed at this time.

NINTH: The plaintiff testified that the authority given to his son was intended by him to be exercised only in payment of his own personal expenses (Record, fol. 276). Whether this intention was ever communicated to his son does not appear; nor is it known, even now, what disposition the son made of the proceeds of the checks in issue (Record, fols. 146-148). The plaintiff testified (Record, fol. 146), as alleged in his complaint, that the proceeds had not been used for his purposes. The sole attempt to

prove actual misappropriation was by reference to his son's entries on the stubs of the check books of the depository banks (Record, fols. 147-148). But the plaintiff's admission of ignorance of the use made of the money is explicit: "I do not know what he did with it. I have no definite knowledge" (Record, fol. 271). Of course, the defendant had none of the cancelled checks which had been taken up by Cahan, Jr., nor any record of the payees (Record, fols. 370-371). It had only deposit slips which accompanied the checks in issue, which it produced (Record, fols. 203-207).

TENTH: Pursuant to stipulation, the case was tried by a jury of one, on motion of each party for a directed verdict (Record, fols. 86, 458, 459). The District Judge directed a verdict in favor of the plaintiff for $31,170, the aggregate amount of the checks in issue, without interest (Record, fols. 464, 722-732). Both parties assigned error, the defendant upon the direction of the verdict (Record, fols. 740-743) and the plaintiff on the disallowance of interest (Record, fols. 770-774).

ELEVENTH: The Circuit Court of Appeals affirmed the judgment of the District Court with respect to the principal amount, the face value of the twenty-one checks in issue; and, reversing the judgment below to this extent, allowed interest thereon from the dates when they were respectively credited by the defendant to Cahan, Jr. (Record, pp. 266-285). It held expressly that Cahan, Jr., had both actual and apparent authority to draw the checks, but that his misappropriation lay in what he did with them. Admitting that the defendant knew nothing of what its depositor, Cahan, Jr., was doing beyond the information given by the checks offered for deposit, the Court nevertheless held that an agent's bank of deposit

is put on notice by, and takes at its peril if it receives without investigation, a check drawn by the agent on his principal's funds to his own order and tendered for the credit of his private account.

III.

Reasons for Review.

TWELFTH: This case involves a question of commercial law applicable to all banks and individuals dealing with checks, drafts and notes negotiated by corporate officers, agents and other fiduciaries. Inasmuch as such persons transact, in their representative capacity, the greater part of modern business, it is important that the legal status of their commercial paper be certain and uniform.

The decision of the Circuit Court of Appeals *expressly* conflicts with the recent decision of the Court of Appeals of New York in *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, and the earlier decision in *Havana Central Railroad Co.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422, as well as with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Santa Marina Co.* v. *Canadian Bank of Commerce*, 254 Fed. 391.

The decision of the Court below is, moreover, contrary to the law as declared by the Circuit Courts of Appeals for the Third and Sixth Circuits, by the courts of last resort in Massachusetts, Connecticut, Pennsylvania, Maryland, West Virginia, Missouri, California, Washington, and other States, and by the House of Lords.

In fact, only two actual decisions, in Tennessee and Mississippi, support the judgment below, and the former is by a divided Court. In the other cases cited by the Court below reliance is placed upon dicta, as distinguished from the issue decided.

THIRTEENTH: The decision of the Court below is based upon a theory of notice which is in direct conflict with repeated decisions of this Court.

WHEREFORE, your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari directing the Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law; and that the judgment of the Circuit Court of Appeals herein may be reversed, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just.

EMPIRE TRUST COMPANY,
By PAUL H. HUDSON,
Vice-President.

VAN VECHTEN VEEDER,
WILLIAM LEE WOODWARD,
Counsel for Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

PAUL H. HUDSON, being duly sworn, says:

I am Vice-President of the Empire Trust Company, a corporation organized under the laws of the State of New York, the petitioner herein, and I have knowledge of this litigation. The foregoing petition and the matters therein set forth are true, to the best of my knowledge, information and belief.

PAUL H. HUDSON.

Sworn to before me this
11th day of March, 1926

FRANK E. SCHWERTZ, Notary Public, Kings County
Kings County Clerk's No. 936, Register's No. 7512
Certificate filed New York County
Clerk's No. 1111, Register's No. 7800
Term expires March 30, 1927

WE HEREBY CERTIFY that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

VAN VECHEN VEEDER,
WILLIAM LEE WOODWARD,
Counsel for Petitioner.

Supreme Court of the United States

EMPIRE TRUST COMPANY, Petitioner-Defendant, against CHARLES HAZLITT CAHAN, Respondent-Plaintiff.	October Term, 1925. No.

BRIEF IN SUPPORT OF PETITION.

Statement of the Issue.

One who deals with commercial paper drawn by a fiduciary (whether a mere agent or formal trustee) may become liable for the fiduciary's misappropriation of funds:

First, by a violation of the contract of deposit between the owner of the funds and his depositary bank; in other words, by payment without authority;

Second, by participating in a diversion of the funds with knowledge or notice of the fraud; for example, by appropriating the funds in payment of the fiduciary's indebtedness. *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Union Stock Yards Bank* v. *Gillespie*, 137 U. S. 411.

The Court below held that the plaintiff's agent "had both actual and apparent authority to draw the twenty-one checks" (Record, p. 270). No other conclusion with

respect to the agent's authority would have been possible under the decisions. *Warren-Scharf Asphalt Paving Co.* v. *Commercial National Bank*, 97 Fed. 181, 185-186 (C. C. A., 6th Cir.); *Hambro* v. *Burnand*, (1904) 2 K. B. 10; *Lloyd* v. *Grace, Smith & Co.*, (1912) A. C. 716.

"Admittedly," said the Court below, "defendant knew nothing of what its depositor Cahan, Jr., was doing except as information was given by the cheques he offered for deposit; wherefore, the record presents this bald legal question: is an agent's bank of deposit put on notice by, and does it take at its peril if it receives without investigation, a check drawn by the agent on his principal's funds to his own order and tendered for the credit of his private account?" (Record, pp. 269-270). Following a dictum in its prior decision in *Havana Central Railroad Co.* v. *Central Trust Co.*, 204 Fed. 546, which it admits is nowhere else stated in such "compendious and far-reaching form" (Record, p. 278), and feeling "acutely the disadvantage of continuing to differ with the highest Court of New York" (Record, p. 282), the Court below decided the issue in favor of the plaintiff.

FIRST POINT.

The petitioner was not put on notice by checks drawn by the plaintiff's agent on his principal's funds to his own order and tendered for the credit of his private account.

In reaching its result the Court below ignored the fact that the form of the checks drawn to the agent's order imported ownership of the proceeds in Cahan, Jr. The possession of a bank check payable to the order of the holder is presumptive evidence of ownership. *Havana Central Railroad* v. *Knickerbocker Trust Co.*, 198 N. Y.

422, 428. Cahan, Jr., was the payee of these checks with power to collect them. The instruments were collected according to their tenor for the account of the very person therein named as payee. *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, 403, 406, where Judge Cardozo distinguished such a case from those in which the depositor had no title to the paper (pp. 405-406). Judge Cardozo was dealing with the case of a corporate officer endorsing to himself checks received by the corporation and drawn to its order as payee, but several of the cases upon which the Court below relied belong in this category (see *infra*, p. 16).

However, whether subject to a trust or not, the deposit of the checks to the credit of Cahan, Jr., would not constitute notice of diversion or misappropriation. The plaintiff had entrusted authority over his funds to his son. The deposit with the defendant bank did not operate to take the funds out of his son's control. So long as the funds remained in Cahan, Jr.'s control they were not diverted. A fiduciary having general authority to draw checks must of necessity have authority to direct their disposition. His authority in this respect can of course be limited; but in the absence of limitations of which the person receiving the checks has knowledge on notice, it may be assumed that it is unlimited. Accordingly, it is almost universally held that a fiduciary, of whatever kind, may deposit the funds of his principal in a bank to his individual credit.

***Santa Marina Co.* v. *Canadian Bank*,** 254 Fed. 391 (certiorari denied 250 U. S. 643); *Commercial Savings Bank & Trust Co.* v. *National Surety Co.*, 294 Fed. 261. *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394; *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y. 225; *Kendall* v. *Fidelity Trust Co.*, 230 Mass. 238; *Allen* v. *Puritan Trust Co.*, 211 Mass. 409, 423; *City of Newburyport* v. *Spear*, 204 Mass. 146, 150; *Batchelder* v. *Central*

National Bank, 188 Mass. 25; *Goodwin* v. *American National Bank*, 48 Conn. 550; *Brookhouse* v. *Union Publishing Co.*, 73 N. H. 368; *Hood* v. *Kensington National Bank*, 230 Penn. St. 508; *Duckett* v. *Mechanics Bank*, 86 Md. 400; *United States Fidelity & Guaranty Co.* v. *Home Bank*, 77 W. Va. 665; *McCullam* v. *Third National Bank*, 237 S. W. Rep. (Mo.) 1051; *Gate City Building & Loan Assn.* v. *National Bank*, 126 Mo. 82; *Mott Iron Works* v. *Metropolitan Bank*, 78 Wash. 294; *Southern Trust & Commerce Bank* v. *San Diego Savings Bank*, 212 Pac. Rep. (Calif.) 385; *United States Fidelity & Banking Co.* v. *First National Bank*, 18 Calif. App. 437; *Interstate National Bank* v. *Claxton*, 97 Texas 569.

Gray v. *Johnston*, L. R. 3 Eng. & Ir. App. 1; *Coleman* v. *Bucks & Oxon Union Bank*, (1897) 2 Ch. 243; *Shields* v. *Bank of Ireland*, (1901) 1 Irish Reports 222.

If he possess the right to do so, it must necessarily follow that the bank has the right to accept the deposit. Knowledge on the part of the bank of the nature of the funds received does not affect the character of the act. The bank has the right to presume that a fiduciary will apply the funds to their proper use under the trust. *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106; *City of Newburyport* v. *First National Bank*, 216 Mass. 304; *Safe Deposit & Trust Co.* v. *Bank*, 194 Penn. St. 334; *Mannerlyn* v. *Bank*, 88 Ga. 333; *Martin* v. *Bank*, 66 Kan. 655; *State* v. *Chicago Bonding Co.*, 215 S. W. Rep. (Mo.) 21; *State* v. *Farmers & Merchants Bank*, 201 N. W. Rep. (Neb.) 897; *Charleston Paint Co.* v. *Exchange Banking Co.*, 123 S. W. Rep. (S. C.) 830; and cases cited *supra*.

This is the settled law of New York. The Court of Appeals said in *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, 111:

> "A fiduciary may legally deposit the trust funds in a bank to his individual account and credit.

> Knowledge on the part of the bank of the nature of the funds received and credited does not affect the character of the act. The bank has the right to presume that the fiduciary will apply the funds to their proper uses under the trust. There are judicial decisions, in cases in which the fiduciary has converted the funds, which hold the contrary (*U. S. Fidelity & G. Co.* v. *Peoples Bank*, 127 Tenn. 720; *Bank of Hickory* v. *McPherson*, 102 Miss. 852). The rule stated by us is, however, established in this and other jurisdictions, as the decisions hereinafter cited will disclose, and accords with reason."

In the recent case of *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, at pages 402-403, Judge Cardozo said:

> "What it did was to accept the check for the use of the depositor upon an agreement that the proceeds should be subject to his order. When the order was given and the money disbursed, the situation was the same as if cash had been delivered for safekeeping and afterwards returned. In such a situation, the defendant is to be held liable, if at all, only upon a showing that by the form of the account it has facilitated a conversion and made itself, in so doing, a party to a tort (*Allen* v. *Puritan Trust Co.*, 211 Mass. 409, 422; *Squire* v. *Ordemann*, 194 N. Y. 394). But nothing that was done by the defendant did facilitate a conversion. Eckerson was the payee of the check with power to collect it. His power was neither increased nor diminished by the form of the deposit. He was the owner of a chose in action whether subject to a trust or free from one. Under the law as it then stood,* a trus-

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* This refers to the provisions of Chapter 588 of the Laws of 1916 (now Sections 104 and 231 of the Surrogates' Court Act), whereby an executor, administrator, guardian or other testamentary trustee is required to invest or deposit funds as such, on pain of removal and of misdemeanor. This statute does not change the rule of law relating to the liability of a bank receiving checks for deposit by the testamentary trustee in his own name (*Manufacturers' Trust Co.* v. *United States Mortgage & Trust Co.*, 122 Misc. 726, 730-732).

> tee did not convert the moneys of the trust by the mere act of depositing them in a bank in his individual name (*Bischoff* v. *Yorkville Bank, supra; Sagone* v. *Mackey*, 225 N. Y. 594, 599; *Wickenheiser* v. *Colonial Bank*, 168 App. Div. 329, 333; 224 N. Y. 650)."

Such is the uniform rule in Massachusetts. In *Kendall* v. *Fidelity Trust Co.*, 230 Mass. 238, where the facts are precisely in point, the Court said:

> "As the defendant had no interest in the deposits and never received any part thereof for the payment of any debt due it, but credited all amounts so collected to Alvero's personal account, it cannot be charged with constructive notice of the fraudulent conduct of the fiduciary. * * * The weight of authority is in accord with the view that if a bank, acting in good faith, merely credits trust funds, knowing them to be such, to the personal account of the fiduciary, it will not be liable if he later misappropriates such funds. Cases cited in Note to Allen v. Puritan Trust Co., L. R. A. 1915, C. 518. As the defendant cannot be charged with constructive notice of the fraudulent acts of Alvero merely because of the form of the checks and because the amounts collected thereon were deposited in his personal account with other funds deposited by him, it follows that there is no evidence that the defendant knew he intended to misappropriate the funds and the defendant therefore cannot be held liable."

See also *Goodwin* v. *American National Bank*, 48 Conn. 350, and *Mott Iron Works* v. *Metropolitan Bank*, 78 Wash. 294.

The plaintiff seeks to distinguish the case of *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, *supra*, on the ground that the acts of an executor were there involved, and that the Court pointed out that an executor has title to the

assets in his hands. We quote the Court's statement of the legal principle applicable to fiduciaries, which the cases cited by the Court show does not depend upon any consideration of legal title. The rule has been applied in numerous cases in which the fiduciary had no legal title: agents, attorneys, corporate officers, public officers, etc. *Kendall* v. *Fidelity Trust Co.*, 230 Mass. 238; *Safe Deposit & Trust Co.* v. *Bank*, 194 Pa. St. 334; *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394; *Mott Iron Works* v. *Metropolitan Bank*, 78 Wash. 294; *Santa Marina Co.* v. *Canadian Bank*, 254 Fed. 391; *Havana Central Railroad Co.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422; *Gate City Building & Loan Assn.* v. *National Bank of Commerce*, 126 Mo. 82; *Goodwin* v. *American National Bank*, 48 Conn. 550.

On principle there can be no valid distinction since possession of a check payable to the order of the holder is presumptive evidence of ownership. *Havana Central R. R. Co.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422, 428; *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, 402, 403. This subject is covered fully in an article by Professor Scott in 34 Harvard Law Review, 454 (March, 1921). He treats trustees and agents as being in the same category. At pages 469-470 he cites numerous decisions and states the law as follows:

> "Thus, if a trustee or other fiduciary indorses a check payable to him as trustee and deposits the same to the credit of his individual account, the bank is under no duty to make inquiry as to the propriety of the depositor's conduct. So too if a trustee draws a check upon an account in another bank standing in his name as trustee, and deposits the same to his individual credit with the defendant bank, the latter bank is not bound to inquire as to the propriety of the trustee's conduct."

There is no liability for participation in the wrongdoing of a fiduciary unless the person dealing with him acts in bad faith or is in some way chargeable with notice of his misconduct. Since this is the test of liability, it is immaterial whether the fiduciary is a trustee with legal title or an agent with a power of disposition.

(a) *The authorities relied upon by the Court below are, save in two instances, obiter dicta.*

The meagreness of authority to the contrary is apparent from the opinion of the Court below.

The Court below is clearly in error in supposing that the Court of Appeals avoided the issue in *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, by relying upon certification. The issue was squarely decided without regard to certification, which was dealt with as a separate and additional consideration.

Among the other State court cases relied upon by the Court below, only two actually decided the issue herein: *U. S. Fidelity & Guaranty Co.* v. *People's Bank*, 127 Tenn. 720, and *Bank* v. *Hickory* v. *McPherson*, 102 Miss. 852; and the former is by a divided court.

The plain difference between the recent English case of *A. L. Underwood, Ltd.* v. *Bank of Liverpool*, (1924) 1 K. B. 775, is that, as the court held, Underwood did not purport to act in the transaction under any authority from the corporation. The checks on their face imported ownership in the company, not in him. The purport of his dealing with them as he did was, not that he acted as agent for the company, but that he acted for himself as principal. As viewed by the Court below, the judgment of the Court of Appeal would be in conflict with the decision of the House of Lords in *Gray* v. *Johnston*, L. R. 3 Eng. & Ir. App. 1. In the latter case the bank was absolved even though the deposits were applied, in ordinary

business routine, to an overdrawn account; "it appears to me wholly impossible to imagine," said Lord Cairns, "that the bankers can have been influenced in any degree in their conduct by the indirect and incidental benefit which they thus derived."

The Court below relied upon *dicta* in two of its prior decisions, *Havana Central R. R. Co.* v. *Central Trust Co.*, 204 Fed. 546, and *Anderson* v. *Kissam*, 35 Fed. 699. Since the former was a suit against the drawee bank, any expression of opinion concerning the liability of the agent's depository bank was necessarily *obiter;* the actual decision was that where a corporate check is drawn by an officer, with express or implied authority to draw it, a bank is not put upon inquiry by the fact that it is drawn to his own order and may be improperly used. *Anderson* v. *Kissam* is not in point, since it was a case of actual notice of fraud. The defendants, who were stock-brokers, applied the proceeds of checks drawn by a bank cashier to the latter's account for margins in stock speculation.

The majority opinion of the Circuit Court of Appeals for the Ninth Circuit in *Farmers' Loan & Trust Co.* v. *Fidelity Trust Co.*, 86 Fed. 541, is based expressly upon the fact that the agent asked for and received from the bank a certificate of deposit in his individual name, which was held to be equivalent to a declaration by him that the money was received by him for his individual use. The dissenting opinion denied that the circumstance that a certificate of deposit was obtained was of itself calculated to put the bank upon inquiry as to the use to which the money was to be put.

The Court below relies upon a statement of law made by the Circuit Court of Appeals for the Eighth Circuit in *Oklahoma State Bank* v. *Galion Iron Works & Mfg. Co.*, 4 Fed. (2d) 337. This statement of law is not sustained

by any one of the cases cited in its support, all of which are either cases of clear lack of authority or of actual notice of fraud. The case was decided on lack of authority. A manufacturing company which sold its machinery to township boards and county commissioners through sales agents, received payment, after appraisal, by means of warrants on township and county treasurers. Sales agents receiving these warrants were required to transmit them to the home office of the company, which collected them when funds were available in the respective treasuries to pay them. A sales agent endorsed a number of these warrants in the name of the company, discounted them with the defendant bank, placed the proceeds to his individual credit, and afterward drew out and appropriated the proceeds. The bank was of course held liable. Obviously, the agent had no authority to endorse the warrants. And the face of the warrants imported ownership in the principal, not in the agent. The ground upon which the decision proceeds is, when a bank with knowledge that its funds belong to the principal and not the agent, which was apparent on the face of the warrants, permits him to deposit funds collected by him for his principal with a bank to his own individual credit, and draw them for his own personal and private use, it is liable to the principal for the moneys, "unless the agent acted within the apparent scope of his authority, which is not claimed."

(b) *The Court below is in direct conflict with the Court of Appeals of New York on the effect of certification.*

The Court below also took direct issue with the Court of Appeals of New York on the effect of certification. In

Whiting v. *Hudson Trust Co.*, 234 N. Y. 394, 404, Judge Cardozo said:

> "The payee of the check, before delivering it to the defendant, had caused it to be certified. The legal result was the same as if he had received the cash over the counter (*Freund* v. *Imp. & T. Nat. Bank*, 76 N. Y. 352; *Carnegie Trust Co.* v. *First N. Bank of N. Y.*, 213 N. Y. 301; *Meuer* v. *Phenix Nat. Bank*, 94 App. Div. 331; 183 N. Y. 511). Between the drawee bank and its depositor, the check had been paid (Neg. Inst. Law, §324; Consol. Laws, ch. 38; *Gallo* v. *Brooklyn Savings Bank*, 199 N. Y. 222). The payee was the owner of a chose in action, the drawee's promise to pay, just as much as if he were the holder of a cashier's draft (*Goshen Nat. Bank* v. *State of N. Y.*, 141 N. Y. 379; *Justh* v. *Nat. Bank of the Commonwealth*, 56 N. Y. 478, 480). What the defendant turned into money was not the obligation of the maker, but that of the drawee. In such circumstances, the act of collection for the account of the depositor was neither a conversion nor anything that had a proximate relation in aiding a conversion. The drawee would have paid in discharge of its own promise if Eckerson rather than the defendant had come to it with the check and demanded payment of the money. If this had been done, and the money then handed to the defendant, there would hardly be a claim that a tort would have resulted, though the money was received with knowledge of its origin. The intervention of a cashier's draft or its equivalent changes the transaction in form, but not in substance (*Goshen Nat. Bank* v. *State of N. Y.*, *supra*)."

In other words, as this Court said in *Merchants Bank* v. *State Bank*, 10 Wall. 604, 648:

> "The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money."

But the Court below disapproved of this view, saying:

> "We regard the certification of the cheques on Cahan, Sr.'s accounts as not controlling and are unable to agree with the reasoning of the Whiting case for the following reason. Let it be admitted as true (p. 404) that 'the legal result (of certification) is the same as if (Cahan, Jr.) had received the cash over the counter and * * * between the drawee-bank and its depositor (the present plaintiff) the cheques had been paid'; it remains true that this action, or any similar one, would have lain just as well if Cahan, Jr., had actually drawn the cash and deposited the same with defendant but had then cotemporaneously informed defendant that he had drawn the money from his father's account by virtue of his letter of attorney and now wished it to go to his personal credit and be available for his personal use" (Record, p. 275).

No authority was cited for this proposition, which is, in effect, that no bank can safely receive for deposit money said by an agent to have been drawn from his principal's funds. In other words, whenever a corporate officer or any other employee deposits checks or cash traceable to his principal, the legal presumption would be that the person making the deposit was a criminal and the bank would be required to make inquiry to establish the depositor's innocence. Such a rule would seriously clog the transaction of business, and would in effect make the banks insurers of the integrity of agents and other fiduciaries instead of placing the burden upon him whose misplaced confidence has made the wrong possible.

SECOND POINT.

The theory of notice applied by the Court below is contrary to the decisions of this Court.

The conclusion reached by the Court below was based upon an erroneous theory of notice. "The question in this case," the Court below said, is "whether there was sufficient notice in and by the face, form and contents of the cheque tendered for deposit" (Record, p. 278). And in deciding this question in the affirmative the Court took this view of notice:

> "It is never doubted that if a bank of deposit has notice which would lead that fiction of the law a 'reasonable man' to suspect wrong, the bank which fails either to verify or dispel that suspicion is responsible for the results" (Record, p. 278).

> "At bottom the question here depends upon whether the form of such drafts as those at bar gives clear enough notice that the agent is not acting in the principal's interest. There are indeed cases in which it might be in the principal's interest for the agent to withdraw funds from the principal's account and deposit them in his own account, even in a bank of the same city or in the same bank. The only case we can think of is one in which the agent wanted to conceal his principal's name in a transaction in which even a cashier's cheque might excite suspicion. But the payment of the agent's own debt might in fact be a part of such transaction, and that possibility does not seem to us sufficient justification. We must balance probabilities and conclude that we hold the form of the cheque should be taken as evidence that the agent is engaged upon ventures of his own, and as to his authority to conduct the same, the bank must assume the risk of investigation" (Record, pp. 281, 282).

While admitting that "it is a hard rule as business is ordinarily conducted" (Record, p. 282), "upon the whole we still incline" to "* * * yield that measure of assistance which the law increasingly attempts to give to the victims of misplaced confidence" (Record, p. 284).

This is in direct conflict with the settled rule in this Court in favor of holders for value before maturity that actual knowledge or wilful abstention from inquiry, where inquiry would have disclosed the infirmity is essential, and that mere negligence, or failure to inquire, where a reasonably prudent man would have inquired, will not suffice.

Thus in *Murray* v. *Lardner*, 2 Wall. 110, 121, this Court held:

> "Suspicion of defect of title or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.
>
> The burden of proof lies on the person who assails the right claimed by the party in possession."

This doctrine was reaffirmed in *Hotchkiss* v. *National Banks*, 21 Wall. 354, 359, where Mr. Justice Field said:

> "A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title."

This is now the statutory rule of notice in New York. New York Negotiable Instruments Law, Section 95 (same as Sec. 56 of the Uniform Negotiable Instruments Law):

> "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

And this provision was properly applied, contrary to the view of the Court below, in *Postal Telegraph-Cable Co. v. Citizens National Bank*, 228 Fed. 601 (3rd Cir., C. C. A.).

The result of the decision of the Court below is that the burden is cast upon the wrong party, reversing the equities of the situation. The equities are well described by the Circuit Court of Appeals for the Fourth Circuit in the recent case of *Norton v. City Bank & Trust Co.*, 294 Fed. 839, 845:

> "The accepted rule is neither arbitrary nor fanciful, but is both just and equitable. The owner of the fund trusts its agent. It tells the bank to pay out its funds on his order. As between him and the bank, the latter is bound to pay whomsoever he will. If any particular check is paid to a person whom he intended to receive it, the bank has done precisely what it was instructed to do. In such cases as that here involved, it is true that the agent has proved false to his trust, and some innocent person must be the loser. Should it not be the one who gave him the power which he misused?"

It is quite beside the point, therefore, to argue, as the Court below does, in support of its conclusion, that if

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Supreme Court of the United States

OCTOBER TERM, 1926. No. 318

EMPIRE TRUST COMPANY,
Petitioner-Defendant,

against

CHARLES HAZLITT CAHAN,
Respondent-Plaintiff.

BRIEF FOR THE PETITIONER-DEFENDANT

VAN VECHTEN VERDER,
WILLIAM LEE WOODWARD,
WILLIAM J. DEAN,
Counsel for Petitioner.

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Supreme Court of the United States

EMPIRE TRUST COMPANY,
Petitioner-Defendant,

AGAINST

CHARLES HAZLITT CAHAN,
Respondent-Plaintiff.

October Term,
1926
No. 318

BRIEF FOR THE PETITIONER-DEFENDANT

This is a writ of *certiorari* in review of the affirmance by the Circuit Court of Appeals for the Second Circuit of a judgment of the United States District Court for the Southern District of New York in favor of the plaintiff in an action at law. The opinion of the Circuit Court of Appeals is printed in the Record, pages 266-285, and is reported in 9 F. (2d) 713. The memorandum filed by the District Judge is printed in the Record, pages 241-244.

The plaintiff sued to recover the proceeds of twenty-one checks, aggregating $31,170, drawn by plaintiff's son, Charles H. Cahan, Jr., under powers of attorney, on funds of the plaintiff on deposit in the Guaranty Trust Company and with the Agents of the Bank of Montreal, both in the City of New York. The checks, which (save in two instances) were certified by the banks on which they were drawn, were deposited by Cahan, Jr., to the credit of his personal account in

the Empire Trust Company, the defendant, in the City of New York, and the proceeds were thereafter drawn by him and used for purposes unknown.

The issue, as stated by the Court below, is:

"Admittedly defendant knew nothing of what its depositor Cahan, Jr., was doing except as information was given by the cheques he offered for deposit; wherefore, the record presents this bald legal question: is an agent's bank of deposit put on notice by, and does it take at its peril if it receives without investigation, a cheque drawn by the agent on his principal's funds to his own order and tendered for the credit of his private account?" (Record, pp. 269-270).

Statement of Facts.

The plaintiff, a Canadian barrister, residing in Montreal, was employed during the war in supervising British munition contracts in this country. The magnitude of the work led him to establish his headquarters in New York City in January, 1915, and in May of that year his son, Charles H. Cahan, Jr., also a Canadian barrister, joined him as an assistant. Father and son lived together, the former paying the living expenses and giving his son $225 a month and an annual bonus of $5,000 or $6,000 (Record, fols. 255, 295).

The plaintiff's duties required much travel. He was frequently in England and traveled throughout the United States. Because of his frequent and long continued absence from New York (fol. 101), he gave his son in 1916 broad powers of attorney on personal accounts carried by him in two New York City banks, the Agents of the Bank of Montreal and the Guaranty Trust Company. By the first, dated May 29, 1916 (at first limited in time and afterwards renewed without limit in duration), he appointed his son his

"attorney, for me, in my name, and on my behalf, to make, sign and draw cheques, on my account with the Agents of the

Bank of Montreal, New York City, and to receive all paid cheques, and to sign the said Bank's form of settlement of balances" (Plaintiff's Ex. 2, fols. 472-476; Ex. 3, fols. 475-479; Ex. 4, fols. 481-485).

By the second, dated September 21, 1916, he appointed his son his

"true and lawful attorney for me and in my name, place and stead, to sign, endorse, deposit, draw, and deliver all such checks and other orders for the payment of money as he may deem proper in connection with any account of funds on deposit which I may now or hereafter have with the Guaranty Trust Company of New York, its agents, successors or assigns; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I myself might or could do if personally present" (Plaintiff's Ex. 1, fols. 466-470).

The plaintiff's work no longer required residence here after the United States entered the war, and he and his son returned to Montreal in the summer of 1917. Meanwhile, Cahan, Jr., had opened an account of his own in the Empire Trust Company on September 29, 1915. The account is printed in full in the Record, pages 197 to 214. The aggregate deposits to August 4, 1919, when the account was closed, amounted to $70,742.08.

In December, 1919, the disclosure of irregularities in his account in the Bank of Montreal and in the accounts of the Corporation Agency, a Canadian company of which the plaintiff was president and his son a director, the discovery that his son had a personal account in the Home Bank of Canada, and his son's disappearance (fols. 120-125), led the plaintiff to inquire about his deposits in the New York banks, to which he had paid no attention after giving his son authority over them (fols. 283, 284). In January, 1920, the plaintiff

discovered in his son's safe deposit box in Montreal twenty of the cancelled checks on the Guaranty Trust Company and the Agents of the Bank of Montreal upon which this suit was brought, showing collection thereof by the defendant bank, which apprised him for the first time of his son's personal account in the defendant bank (fols. 133-135).

After receiving such assistance from the defendant as the records in its possession afforded (fol. 233), the plaintiff sued on the twenty-one checks described in the complaint. The twenty-first check therein described was not found, but the Guaranty Trust Company's books show that it was drawn on plaintiff's account there, and this is admitted in the defendant's answer; but it is not known how it was drawn. It appears, however, that it was certified (fols. 390-392).

The face, form and contents of the checks are printed in full at pages 163 to 182 of the Record. All the checks are signed "C. H. Cahan, By C. H. Cahan, Jr., His Attorney". Seventeen of the twenty-one checks are payable to the order of Cahan, Jr., three to the order of the Empire Trust Company (Plaintiff's Exhibits 5-C, 5-D and 5-J, fols. 496-498, 499-501, 517-519); the twenty-first check, as stated, has not been found and it is not known how it was drawn. All the checks, save two (Plaintiff's Exhibits 5-R and 5-S, fols. 541-543, 544-546), were either certified by the Guaranty Trust Company or accepted by the Agents of the Bank of Montreal, according as they were drawn on one or the other bank. Thus certified (fols. 381-388, 394-397), all the checks were deposited by Cahan, Jr., to the credit of his account with the defendant bank. Each deposit was accompanied by a deposit slip (fol. 304; Defendant's Exhibits A to A-20, fols. 667-686), save two (Defendant's Exhibits A-1 and A-2, fols. 668-671) received by mail (fols. 378-380, 652-654), for which the deposit slips were made out by the defendant's receiving teller.

The defendant made no loans to Cahan, Jr. (fols. 437-438).

The plaintiff testified that the authority given to his son was intended by him to be exercised only in payment of his own personal expenses (fol. 276). Whether this intention was communicated even to his son does not appear. Nor is it known even now what disposition the son made of the proceeds of the checks in issue (fols. 147-148). The plaintiff testified (fol. 146), as he alleged in his complaint, that the proceeds had not been used for his purposes; "I do not know what he did with it. I have no definite knowledge" (fol. 271). Of course the defendant had none of the cancelled checks, which had been taken up by Cahan, Jr., nor any record of payees (fols. 370-371). It had only the deposit slips which accompanied the checks in issue, which it produced (fols. 303-307).

Pursuant to stipulation the case was tried by a jury of one, on motion by each party for a directed verdict (fols. 86, 458-459). At the trial the defendant withdrew the second, third, fourth and fifth separate defenses alleged in the answer (pars. Twelfth to Twenty-first, inclusive, fols. 57-71; fols. 183, 185, 84-85). The District Judge finally directed a verdict in favor of the plaintiff for $31,170, the aggregate amount of the checks in issue, without interest (fol. 454), and filed a written memorandum in explanation of his action (fols. 722-732).

On writ of error to the Circuit Court of Appeals, the defendant assigned error upon the direction of the verdict and the plaintiff upon the disallowance of interest (fols. 740-770). The Court below affirmed the judgment of the District Court with respect to the principal amount, the face value of the twenty-one checks in issue; and, reversing the judgment below to this extent, allowed interest thereon from the dates when

they were respectively credited by the defendant to Cahan, Jr. (Record, pp. 266-285). It held expressly that Cahan, Jr., had both actual and apparent authority to draw the checks, but that his misappropriation lay in what he did with them (p. 270). Conceding that the "defendant knew nothing of what its depositor, Cahan, Jr., was doing, except as information was given by the cheques offered for deposit" (p. 269), the Court nevertheless followed "the judge-made business safeguard against dishonesty asserted by this court in *Havana, etc.* v. *Central, etc.*, 204 Fed. 546, at page 548" (p. 272), although admitting that the cases "nowhere state the rule in the compendious and far-reaching form in which it was put by Judge Noyes", in that case (p. 278).

ARGUMENT

I. The defendant did not participate in the diversion of the plaintiff's funds with knowledge or notice of fraud.

One who deals with commercial paper drawn by a fiduciary (whether a mere agent or formal trustee) may become liable for the fiduciary's misappropriation of funds.

First, by a violation of the contract of deposit between the owner of the funds and his depositary bank; in other words, by payment without authority;

Second, by participating in a diversion of the funds with knowledge or notice of the fraud; for example, by appropriating the funds in payment of the fiduciary's indebtedness (*National Bank* v. *Insurance Co.*, 104 U. S. 54; *Union Stock Yards Bank* v. *Gillespie*, 137 U. S. 411; *Ward* v. *City Trust Co.*, 192 N. Y. 61).

The two grounds of liability are distinct, and the failure to observe the distinction explains the confusion in many of the decided cases.

1. Cahan, Jr., had authority to draw the checks in issue.

The Court below clarified the issue by holding, contrary to the view of the District Judge (fol. 725), that Cahan, Jr., "had both actual and apparent authority to draw the twenty-one cheques, and the misappropriation of which he was undoubtedly guilty lay not in the drawing of the cheques but in what he did with them" (p. 270).

An erroneous conception of authority pervades the plaintiff's case. The complaint alleges that Cahan, Jr., "had no power or authority under any of the said recited powers of attorney, to make, sign or draw checks of the plaintiff for the purpose of transferring or appropriating to himself or for his own personal and private use or benefit the funds of the plaintiff". And the plaintiff contends that this is so, because the law reads into every authorization to an agent to act for a principal the limitation that it is to be used for the benefit of the principal, not for the purposes of the agent. We admit that this implication is valid without qualification as applied to the relation between the agent and his principal. But when the rights of a third person intervene, the statement requires modification. The fact that an agent acts for his own benefit without actual authority is immaterial as against a third person who deals with the agent on the face of his apparent authority. To say that the agent must act for the benefit of his principal refers to the use to be made of the funds, not to the power; it relates to the purposes of the execution, not to the scope of the power.

The point is fully discussed on principle and authority in *North River Bank* v. *Aymar*, 3 Hill (N. Y.) 262; *Hambro* v.

Burnand, [1904] 2 K. B. 10, and *Lloyd* v. *Grace, Smith & Co.*, [1912] A. C. 716; and it was applied by this Court in *National Safe Deposit Co.* v. *Hibbs*, 229 U. S. 391, and by the Circuit Court of Appeals for the Sixth Circuit in *Warren-Scharf Asphalt Paving Company* v. *Commercial National Bank*, 97 Fed. 181.

The defendant may rely upon the powers of attorney in evidence, although it had not examined them. *Ward* v. *City Trust Co.* 192 N. Y. 61, 70; *Hambro* v. *Burnand*, [1904] 2 K. B. 10, 24, 26; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201, 220.

2. The form and deposit of the checks did not charge the defendant with notice of misappropriation.

A fiduciary having general authority to draw funds must necessarily have power to direct their disposition. The plaintiff entrusted authority over his funds to his son. The deposit with the defendant bank did not operate to take the funds out of his son's control. So long as the funds remained in Cahan, Jr.'s control they were not diverted. Accordingly, it is almost universally held that a fiduciary, of whatsoever kind, may deposit the funds of his principal in a bank to his individual credit.

Whiting v. *Hudson Trust Co.*, 234 N. Y. 394; *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y. 225; *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106;

Kendall v. *Fidelity Trust Co.*, 230 Mass. 238; *Allen* v. *Puritan Trust Co.*, 211 Mass. 409, 423; *City of Newburyport* v. *Spear*, 204 Mass. 146, 150; *Batchelder* v. *Central National Bank*, 188 Mass. 25;

Santa Marina Co. v. *Canadian Bank*, 254 Fed. 391 (certiorari denied 250 U. S. 643); *Commercial*

Sac. Bank & T. Co. v. *Nat. Surety Co.*, 294 Fed. 261;

Goodwin v. *American National Bank*, 48 Conn. 550;

Brookhouse v. *Union Publishing Co.*, 73 N. H. 368;

Hood v. *Kensington National Bank*, 230 Penn. St. 508;

Duckett v. *Mechanics Bank*, 86 Md. 400;

United States Fidelity & Guaranty Co. v. *Home Bank*, 77 W. Va. 665;

McCullam v. *Third National Bank*, 209 Mo. App. 266; *Gate City Building & Loan Association* v. *National Bank*, 126 Mo. 82;

Mott Iron Works v. *Metropolitan Bank*, 78 Wash. 294; *Rice* v. *Peoples Savings Bank*, 247 Pac. (Wash.) 1009;

Southern Trust & Commerce Bank v. *San Diego Savings Bank*, 60 Calif. App. 215; *United States Fidelity & Guaranty Co.* v. *First National Bank*, 18 Calif. App. 437;

State v. *Farmers & Merchants Bank*, 112 Neb. 840;

Interstate National Bank v. *Claxton*, 97 Tex. 569;

The Corporation Agencies, Ltd. v. *The Home Bank of Canada* (Privy Council, Jan. 18, 1927), Appendix, p. 29; *Gray* v. *Johnston*, L. R. 3 Eng. & Ir. App. 1; *Coleman* v. *Bucks & Oxon Union Bank*, [1897] 2 Ch. 243; *Shields* v. *Bank of Ireland*, [1901] 1 Ir. Rep. 222.

If he possess the right to do so, it necessarily follows that the bank has the right to accept the deposit. Knowledge on the part of the bank of the nature of the funds received does not affect the character of the act. The bank has the right to assume that a fiduciary will apply the funds to their proper use under the trust. *Bischoff* v. *Yorkville Bank*, 218

N. Y. 106; *Town of Eastchester* v. *Mt. Vernon Trust Co.*, 173 App. Div. 482; *City of Newburyport* v. *First National Bank*, 216 Mass. 304; *Safe Deposit & Trust Co.* v. *Bank*, 194 Penn. St. 334; *Munnerlyn* v. *Bank*, 88 Ga. 333; *Martin* v. *Bank*, 66 Kan. 655; *State* v. *Farmers & Merchants Bank*, 112 Neb. 840; *Charleston Paint Co.* v. *Exchange Banking Co.*, 129 S. C. 290; and cases cited *supra*.

This is now the settled law of New York. The Court of Appeals said in *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, 111:

"A fiduciary may legally deposit the trust funds in a bank to his individual account and credit. Knowledge on the part of the bank of the nature of the funds received and credited does not affect the character of the act. The bank has the right to presume that the fiduciary will apply the funds to their proper uses under the trust. There are judicial decisions, in cases in which the fiduciary has converted the funds, which hold the contrary (*U. S. Fidelity & G. Co.* v. *Peoples Bank*, 127 Tenn. 720; *Bank of Hickory* v. *McPherson*, 102 Miss. 852). The rule stated by us is, however, established in this and other jurisdictions, as the decisions hereinafter cited will disclose, and accords with reason."

In the recent case of *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, 402, Judge Cardozo said:

"What it did was to accept the check for the use of the depositor upon an agreement that the proceeds should be subject to his order. When the order was given and the money disbursed, the situation was the same as if cash had been delivered for safekeeping and afterwards returned. In such a situation, the defendant is to be held liable, if at all, only upon a showing that by the form of the account it has facilitated a conversion and made itself, in so doing, a party to a tort (*Allen* v. *Puritan Trust Co.*, 211 Mass. 409, 422; *Squire* v. *Ordemann*, 194 N. Y. 394). But nothing that was done by the defendant did facilitate a conversion. Eckerson was the payee of the check with power to collect it. His power was neither increased nor diminished by the form of the deposit. He was the owner of a chose in action whether subject to a

trust or free from one. Under the law as it then stood,* a trustee did not convert the moneys of the trust by the mere act of depositing them in a bank in his individual name (*Bischoff* v. *Yorkville Bank, supra; Sagoney* v. *Mackey*, 225 N. Y. 594, 599; *Wickenheiser* v. *Colonial Bank*, 168 App. Div. 329, 333; 224 N. Y. 650)."

Such is the rule in Massachusetts, *Kendall* v. *Fidelity Trust Co.*, 230 Mass. 238, 241, where the Court said:

"As the defendant had no interest in the deposits and never received any part thereof for the payment of any debt due it, but credited all amounts so collected to Alvero's personal account, it cannot be charged with constructive notice of the fraudulent conduct of the fiduciary. * * * The weight of authority is in accord with the view that if a bank, acting in good faith, merely credits trust funds, knowing them to be such to the personal account of the fiduciary, it will not be liable if he later misappropriates such funds. Cases cited in note to *Allen* v. *Puritan Trust Co.*, L. R. A. 1915 C 518. As the defendant cannot be charged with constructive notice of the fraudulent acts of Alvero merely because of the form of the checks and because the amounts collected thereon were deposited in his personal account with other funds deposited by him, it follows that there is no evidence that the defendant knew he intended to misappropriate the funds and the defendant therefore cannot be held liable."

See, also, *Goodwin* v. *American National Bank*, 48 Conn. 550, and *Mott Iron Works* v. *Metropolitan Bank*, 78 Wash. 294.

While there could be little doubt about English law on this issue after *Gray* v. *Johnston*, L. R. 3 Eng. & Ir. App. 1, English law is now conclusively settled by the decision of the

* This refers to the provisions of Chapter 588 of the Laws of 1916 (now Sections 194 and 231 of the Surrogates' Court Act), whereby an executor, administrator, guardian or other testamentary trustee is required to invest or deposit funds as such, on pain of removal and of misdemeanor. This statute does not change the rule of law relating to the liability of a bank receiving checks for deposit by the testamentary trustee in his own name (*Manufacturers' Trust Co.* v. *United States Mortgage & Trust Co.*, 122 Misc. 726, 730-732; affirmed 213 App. Div. 345).

Judicial Committee of the Privy Council in the case of *The Corporation Agencies, Ltd.* v. *The Home Bank of Canada*, on January 18 last. Since it has not yet been reported, we have printed it as Appendix hereto, page 29. This is not only the latest authoritative expression of the law; it is applied to the precise issue and arises out of the activities of Cahan, Jr., himself. Reference has been made in the statement, page 3, *supra*, to the plaintiff's testimony that he first discovered his son's irregularities in connection with the accounts of the Corporation Agencies, a Canadian company of which the plaintiff was president and his son a director; and that the plaintiff then learned that his son had an account of his own in the Home Bank of Canada. It appears that Cahan, Jr., had made use of the Corporation Agencies' account to further his fraudulent operations. Between March 29 and December 20, 1919, Cahan, Jr., as director and the secretary-treasurer (a party to the fraud), who were authorized by the by-laws to draw checks, drew a number of checks, some payable to the order of Cahan, Jr., others payable to the order of the Home Bank. The checks were then paid into Cahan, Jr.'s personal account with the Home Bank. In other words, the situation in its legal aspects was like the case at bar. The Privy Council held that the defendant was not put on notice:

"For by way of illustration, take again the first cheque, that for $500, of the 29th March 1919. When Cahan, Junior, paid that cheque into his account at the defendants' bank, suppose the bank had asked, 'For what is this cheque given for?' would he have been bound to answer? The cheque might have been for salary or for a sum due to Cahan, Junior, on any other account. The defendant bank had no duty to enquire as to the obligation in respect of which it was given. They would in ordinary course of business taken the cheque and if on presentation to the Merchants' Bank payment were refused, they would debit their customer with the amount.

During April three like cheques for $300, $498.74 and $298.15, were endorsed and handed to the defendant bank by

Cahan, Junior. The practice of the Merchants' Bank was not to issue a pass-book, but to render monthly accounts. Such monthly accounts were duly rendered for March and April, 1919, to the Company. These contained the cheques above referred to. Thus the plaintiffs knew (so far as the defendant bank had knowledge or reason to believe) that the March and April cheques, drawn as they were in favour of Cahan, Junior, were being accepted by the Company as being on their face in order. And so matters went on during the subsequent months, and *a fortiori* the defendant bank had every reason to believe, as successive monthly accounts were sent and no objection raised, that the cheques were legitimate and not in fraud of the Company. The Company were, unfortunately for them, in the hands of fraudulent agents, but the defendant bank had neither knowledge nor notice that that was so and, in fact, from the unquestioned acceptance of the monthly accounts, were entitled to believe the contrary."

If the plaintiff could deposit the funds in his own account, he could draw them out. If the former constituted no notice of diversion, neither would the latter. The law does not require the bank to assume the hazard of correctly reading in each check the purpose of the drawer. *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, 112, where the court said:

"The presumption is, and after the deposits are made remains until annulled by adequate notice or knowledge, that the depositor would preserve or lawfully apply the trust funds. The contract, arising by implication of law, from a general deposit of moneys in a bank is that the bank will, whenever required, pay the moneys in such sums and to such persons as the depositor shall direct and designate. Although the depositor is drawing checks which the bank may surmise or suspect are for his personal benefit, it is bound to presume, in the absence of adequate notice to the contrary, that they are properly and lawfully drawn."

See also, *Kendall* v. *Fidelity Trust Co.*, 230 Mass. 238; *City of Newburyport* v. *First National Bank of Boston*, 216 Mass. 304; *Goodwin* v. *American National Bank*, 48 Conn. 530.

The plaintiff seeks to distinguish the case of *Bischoff* v.

Yorkville Bank, 218 N. Y. 106, *supra*, on the ground that the acts of an executor were there involved, and that the court pointed out that an executor has title to the assets in his hands. We quote the court's statement of the legal principle applicable to fiduciaries, which the cases cited by the court show does not depend upon any consideration of legal title. In the case of *Fidelity & Deposit Co.* v. *Queens Trust Co.*, 226 N. Y. 225, *supra*, the trustee in bankruptcy whose checks were in issue also had legal title to the funds, but no reference is made to that fact; and the cases cited do not proceed upon that ground.

The rule has been applied in numerous cases in which the fiduciary had no legal title: agents, attorneys, corporate officers, public officers, etc. *The Corporation Agencies, Ltd.*, v. *The Home Bank of Canada*, Appendix, p. ; *Kendall* v. *Fidelity Trust Co.*, 230 Mass. 238; *Safe Deposit & Trust Co.* v. *Bank*, 194 Pa. St. 334; *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394; *Mott Iron Works* v. *Metropolitan Bank*, 78 Wash. 294; *Charleston Paint Co.* v. *Exchange Banking & Trust Co.*, 129 S. C. 290; *Santa Marina Co.* v. *Canadian Bank*, 254 Fed. 391; *Havana Central Railroad Co.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422; *Gate City Building & Loan Assn.* v. *National Bank of Commerce*, 126 Mo. 82; *McCullam* v. *Third National Bank*, 209 Mo. App. 266; *Goodwin* v. *American National Bank*, 48 Conn. 550.

On principle there can be no valid distinction since possession of a check payable to the order of the holder is presumptive evidence of ownership. *Havana Central R. R. Co.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422, 428. This is made clear by our quotation, *supra*, from *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, 402, 403. There the first check with which the Court deals was drawn by an attorney in fact. As Judge Cardozo says, "He was the owner of a chose in action whether subject to a trust or free from one."

This subject is covered fully in an article by Professor Scott in 34 Harvard Law Review, 454 (1921). He treats trustees and agents as being in the same category. At pages 469-470 he cites numerous decisions and states the law as follows:

"Thus if a trustee or other fiduciary indorses a check payable to him as trustee and deposits the same to the credit of his individual account, the bank is under no duty to make inquiry as to the propriety of the depositor's conduct. So too if a trustee draws a check upon an account in another bank standing in his name as trustee, and deposits the same to his individual credit with the defendant bank, the latter bank is not bound to inquire as to the propriety of the trustee's conduct."

There is no liability for participation in the wrongdoing of a fiduciary unless the person dealing with him is chargeable with notice of his misconduct. Since this is the test of liability, it is immaterial whether the fiduciary is a trustee with legal title or an agent with a power of disposition.

In the course of the vast daily volume of business conducted with bank checks drawn in a representative capacity, there is legitimate need in a multitude of instances that the representative should order payment of these instruments to himself or to third persons, both for the purposes of the principal and for his personal uses. If he is an authorized officer of a corporation he uses the corporation check to pay himself his salary, or dividends if he is a stockholder, or expenses of a business trip, or to obtain cash to purchase supplies or for payroll purposes.

For aught the bank would know, though a check is payable to its depositor in a representative capacity, the money would belong absolutely to him. *U. S. Fidelity & Guaranty Co. v. Home Bank for Savings*, 77 W. Va. 665. In the case at bar, having regard to the plaintiff's pur-

poses, in view of his long continued absences, in employing his son, the checks might have been for the son's salary or his annual bonus, or family living expenses; or it might represent money already paid out by him in discharge of his fiduciary duties. *The Corporation Agencies, Ltd.* v. *The Home Bank of Canada*, Appendix, pages 29, 35; *U. S. Fidelity & Guaranty Co.* v. *Home Bank for Savings*, 77 W. Va. 665.

Banks are called upon to receive these fiduciary checks without inquiry concerning the purposes for which the checks are used, in reliance upon the presumption that the representative is acting honestly. In view of the vast number of items handled daily, inquiry of the principal is absolutely impracticable. Such inquiry, if made, with the attendant delay, would be certain to be resented as an unwarranted and unnecessary interference with the principal's business and an imputation upon the fiduciary's honesty. Thus banks are called upon to handle this volume of representative checks as so much currency, signed by a fiduciary who has power to control and dispose of the funds, without time or opportunity for investigation of the integrity of his purposes.

The practical aim of the Court below is to establish a "judge-made business safeguard against dishonesty" because, it is said:

"In the case of agents acting by procuration, if there be no such rule, if, for instance an attorney in fact can as such attorney not only withdraw his principal's funds from one bank, as he plainly has a right to do, but deposit them in another (or even perhaps in the same bank) to his own credit without any responsibility on the part of the bank accepting such deposit, a principal who gives a power of attorney, a private corporation which gives unusual powers to its financial officer, a municipality which can only act through its elected or appointed officers, is left without any remedy except that which the Connecticut court thinks is all that the law gives, *i. e.*, the integrity of its fiduciary" (p. 281).

But in all such cases the principal who confers the authority may limit it as he sees fit, or the agent may be bonded. If the principal sees fit to trust the agent with unlimited authority, its abuse affords no reason for visiting the consequences upon others. Fidelity is the sole guaranty of faith. No safeguard is effective. For a dishonest fiduciary, so long as he acts under general powers, can always draw cash and misappropriate it.

The generally accepted rule is neither arbitrary nor fanciful. It is both just and equitable. The owner of the funds trusts his agent. He tells the bank to pay out his funds on his agent's order. In this case the agent has proved false to his trust, and some innocent person must suffer. This Court has said that under such circumstances "the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible". *National Safe Deposit Co.* vs. *Hibbs*, 229 U. S. 391, 397.

(a) *Certification.*

Moreover, all but the last two checks were certified or accepted by the plaintiff's depository banks. The effect of this, according to the New York rule, is stated by the Court of Appeals in *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, 404:

"The payee of the check, before delivering it to the defendant, had caused it to be certified. The legal result was the same as if he had received the cash over the counter (*Freund* v. *Imp. & T. Nat. Bank*, 76 N. Y. 352; *Carnegie Trust Co.* v. *First N. Bank of N. Y.*, 213 N. Y. 301; *Meuer* v. *Phenix Nat. Bank*, 94 App. Div. 331; 183 N. Y. 511). Between the drawee bank and its depositor, the check had been paid (Neg. Inst. Law, § 324; Consol. Laws, ch. 38; *Gallo* v. *Brooklyn Savings Bank*, 199 N. Y. 222). The payee was the owner of a chose in action, the drawee's promise to pay, just as much as if he were the holder of a cashier's draft (*Goshen Nat. Bank* v. *State of N. Y.*, 141 N. Y. 379; *Jusith* v.

Nat. Bank of the Commonwealth, 56 N. Y. 478, 480). What the defendant turned into money was not the obligation of the maker, but that of the drawee. In such circumstances, the act of collection for the account of the depositor was neither a conversion nor anything that had a proximate relation in aiding a conversion. The drawee would have paid in discharge of its own promise if Eckerson rather than the defendant had come to it with the check and demanded payment of the money. If this had been done, and the money then handed to the defendant, there would hardly be a claim that a tort would have resulted, though the money was received with knowledge of its origin. The intervention of a cashier's draft or its equivalent changes the transaction in form, but not in substance (*Goshen Nat. Bank* v. *State of N. Y.*, *supra*)."

In other words, as this Court said in *Merchants Bank* v. *State Bank*, 10 Wall. 604, 648:

"The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money."

The Court below took direct issue with this view of certification. Although the legal result of certification be the same as if Cahan, Jr., had received the cash over the counter, Judge Hough asserts that this action "would have lain just as well if Cahan, Jr., had actually drawn the cash and deposited the same with defendant but had then contemporaneously informed defendant that he had drawn the money from his father's account by virtue of his letter of attorney and now wished it to go to his personal credit" (p. 275). No authority was cited for such a harsh rule, which would seriously impair the legitimate transfer of funds and impose upon banks the burden of insuring the integrity of fiduciaries. Judge Hough's statement that "certification is not a guaranty of the identity or authority of the payee" (p. 283) would

seem to be immaterial in view of his finding that Cahan, Jr., "had both actual and apparent authority to draw the twenty-one cheques" (p. 270).

(b) *Cases relied upon by the Court below.*

Brief reference may be made to the cases relied upon by the Court below. The Court expressly followed an *obiter dictum* by Judge Noyes in *Havana Central Railroad Co.* v. *Central Trust Co.*, 204 Fed. 546, 551. That was a suit against the drawee, or principal's, bank. Having decided that the bank was not put upon inquiry by checks drawn to the agent's order, the issue was disposed of. Yet Judge Noyes went on to say:

"But if the bank have knowledge that the officer is using the check for his personal benefit, *e. g.*, to pay his debt to the bank or to deposit it to his personal credit, then the bank is put upon inquiry, and if it fail to make it, pays at its peril."

Judge Noyes was still thinking of the Court of Appeals' disposition of the suit against the agent's, or payee, bank in *Havana Central Railroad Co.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422, to which most of his opinion was directed.

The Court below also devoted much attention to the error of the Court of Appeals in the *Havana Railroad* case. This was quite unnecessary because the Court of Appeals had admitted in *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, 423, that the relation between the bank and its depositor was that of debtor and creditor, not of agency. The defendant relies upon *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, and the *Whiting* case, *supra*, for the New York rule. The *Whiting* case is the latest and most comprehensive review of the subject. Besides correcting the error in the *Havana Railroad* case in 198 N. Y., it limits *Wagner Trading Co.* v. *Battery*

Park National Bank, 228 N. Y. 37, to cases of endorsement, and settles the law in accordance with the *Bischoff* case. And it did not go off, as the Court below thought, on the fact that the check was certified. After deciding that the Trust Company was not put on notice by the first check, drawn by Eckerson, attorney, to the order of Eckerson, trustee (234 N. Y. 402, 403), the Court then addressed itself to the plaintiff's additional point that the deposit was wrongful because of the description of the maker. "One answer to this point suffices, though others may be available. The payee of the check, before delivering it to the defendant, had caused it to be certified" (pp. 403, 404).

The Court below quotes from the opinion in *Anderson* v. *Kissam*, 35 Fed. 699. But that was a case where there was actual notice of fraud. The cashier of a bank, who was a customer of the defendants, a firm of stockbrokers, delivered to the defendants from time to time checks of his bank upon another bank, its correspondent, drawn by him in his official capacity. The defendants collected them from the bank on which they were drawn and applied the proceeds on the cashier's account with them for stock speculations on margin. The defendants therefore knew that the cashier was using the proceeds of the checks in his personal transactions, and were accordingly liable for the proceeds.

The majority opinion of the Circuit Court of Appeals for the Ninth Circuit in *Farmers' Loan & Trust Co.* v. *Fidelity Trust Co.*, 86 Fed. 541, is based expressly upon the fact that the agent asked for and received from the bank a certificate of deposit in his individual name, which was held to be equivalent to a declaration by him that the money was received by him for his individual use. The dissenting opinion denied that the circumstance that a certificate of deposit was obtained was of itself calulated to put the bank

upon inquiry as to the use to which the money was to be put.

The Court below relies upon a statement of law made by the Circuit Court of Appeals for the Eighth Circuit in *Oklahoma State Bank* v. *Galion Iron Works & Mfg. Co.*, 4 Fed. (2d) 337. This statement is not sustained by any of the cases cited in its support; all of them are either cases of clear lack of authority or of actual notice of fraud. The case was decided on lack of authority. A manufacturing company which sold its machinery to township boards and county commissioners through sales agents, received payment, after appraisal, by means of warrants on township and county treasurers. Sales agents receiving these warrants were required to transmit them to the home office of the company, which collected them when funds were available in the respective treasuries to pay them. A sales agent endorsed a number of these warrants in the name of the company, discounted them with the defendant bank, placed the proceeds to his individual credit, and afterward drew out and appropriated the proceeds.

The English case of *A. L. Underwood, Ltd.* v. *Bank of Liverpool* [1924], 1 K. B. 775, is a further example of absence of authority. The plaintiff sued the bank for converting certain checks. The connection of the defendant bank with these checks was that A. L. Underwood, who was the sole director of the plaintiff company, paid them into his private account at the defendants' bank for collection, having as sole director of the company endorsed them "A. L. Underwood, Ltd.: A. L. Underwood, Sole Director." The defendant bank collected them, paid the proceeds into A. L. Underwood's individual account and honored checks drawn by him against them. The bank was held liable on the ground that Underwood did not purport to act in the transaction under

any authority from the company. The checks were plainly, on their face, the property of the company, and were endorsed by Underwood as sole director. He did not purport, in dealing with the checks as he did, to be acting as agent for the company; he was acting and purporting to act for himself as principal.

(c) *Indebtedness and notice according to the District Court.*

The defendant made no loans to Cahan, Jr. (fols. 437, 438). The Court below found that the transfer by the twenty-one checks of the funds and the expenditure thereof were "certainly not to pay any indebtedness of Cahan, Jr., to defendant, as Empire Trust never loaned any money to that depositor" (p. 267). This finding disposes of the District Judge's intimation that three of the checks "would seem" to have been in payment of such indebtedness (fol. 727), as well as the plaintiff's suggestion of "threatened overdraft", for an overdraft is a form of indebtedness (*Bacon v. United States*, 97 Fed. 35, 43). Neither theory was well founded, as a brief reference to the facts will show.

The proof shows that the three checks drawn to the order of the defendant (Plaintiff's Exs. 5-C, 5-D, 5-J, fols. 496, 499, 517) were deposited, like the checks payable to his order, to Cahan, Jr.'s credit. The deposit slips which accompanied the checks (Defendant's Exs. A-10, A-16, A-17, fols. 680, 689, 691) directed deposit to his account. These checks had also been certified. In view of the uncontroverted fact, it is difficult to understand how the District Judge could suppose that the defendant was charged with notice that Cahan, Jr. was actually using these three checks for his personal benefit (fol. 726), unless he thought they had been drawn to pay indebtedness. Cahan, Jr. had authority to draw these checks,

and when by his direction they were deposited to his credit, the same presumption attached to them as to the other checks, and the defendant was no more chargeable with notice in one case than it was in the other. Several checks involved in *The Corporation Agencies, Ltd. v. The Home Bank of Canada*, Appendix, p. 32, were drawn to the bank's order. Certainly the case of *Newton v. Guerin*, 279 Fed. 256, which the District Judge cited as authority, lends no support to his conclusion. For that case simply held that an importer who had deposited with a collector of customs a check payable to the latter's order, for the specific purpose of securing the release of goods pending the receipt of a proper bill of lading, could recover the amount from the collector who had applied the proceeds to the payment of duties of third persons. Nor is the case of *Sims v. U. S. Trust Co.*, 103 N. Y. 472, which the plaintiff cites, in point. For in that case the plaintiff entrusted to another his check payable to the order of the defendant bank, with instructions to deposit it to his credit. The person in possession of the check delivered it to the defendant, but obtained from the bank a certificate of deposit payable to himself as trustee for the plaintiff, and thereafter drew the money and appropriated it to his own use. The bank dealt with him in an isolated transaction in reliance upon his mere possession of the check. The certificate of deposit conveyed express notice of the ownership of the funds, and the court held that the bank was liable for paying out the funds without authority.

In the absence of proof of overdraft, the plaintiff suggests "threatened overdrafts" on certain days when Cahan, Jr.'s account would have been overdrawn if he had not deposited the checks dated August 1, 1916, September 1, 1916, April 12, 1917, and May 26, 1917 (Plaintiff's Exs. 5-A, 5-B, 5-M, 5-N, pp. 164, 165, 176, 177). All these checks were certified the

day they were drawn, as noted on the deposit slips (Defendant's Exs. A-6, A-7, A-18, A-19, pp. 226, 231, 232). Overdrafts were invariably entered in red ink (fols. 417, 418, 420, 421), and the only such entry in the defendant's ledger (Plaintiff's Ex. 11, pp. 197-214) was on December 9, 1915, for which date the debit appears on a line above the deposit. Three of the deposits in question are on a line above the day's debit, which signifies receipt and posting of the deposits before receipt and posting of the checks (fols. 311, 332, 358), while the deposit and the debit of September 1, 1916, both appear on the same line at the foot of the ledger, where the bookkeeper posted them instead of using a new ledger sheet (fol. 346). The deposit of September 1, 1916, evidently preceded the debit; otherwise a red ink entry would have been made (fol. 416).

It does not follow that Cahan, Jr.'s account would have been overdrawn but for the deposits; for if his checks had been received by the bank before his deposits, the bank might not have charged his checks until deposits were received to cover them.

Approval of the check of August 1, 1916, for "immediate credit" plainly shows that it was not received for collection. The absence of special approval of the other three checks was of no importance, because they were immediately credited to the depositor on the day they were drawn, certified and deposited. All were payable to Cahan, Jr., and endorsed and deposited by him without restriction and credited immediately. The defendant therefore became his debtor and not an agent for collection. *Douglas* v. *Federal Reserve Bank*, 271 U. S. 489, 492; *Burton* v. *United States*, 196 U. S. 283, 302, 303; *Cragie* v. *Hadley*, 99 N. Y. 131.

The deposit slips (Defendant's Exs. A-6, A-7, A-18, A-19, pp. 226, 231, 232) read in the light of the defendant's regular

practice show a certification of these four checks prior to their deposit by Cahan, Jr. (fols. 382, 383, 384, 397). He himself made out three of the slips, A-6, A-18 and A-19 (fol. 444). He was the payee of all four and doubtless procured their certification, which discharged the drawer and any endorser from liability thereon (Sections 2 and 324, New York Negotiable Instruments Law). It was not the bank's custom to send out for certification checks deposited by its customers (fol. 397). None of these checks was dishonored by the drawee bank. All show payment through the New York Clearing House on the date of their receipt by the defendant. Neither the rule for allowance of twenty-four hours for clearance, nor the bank's right to charge them back if dishonored, made the defendant an agent for collection (*Heinrich* v. *First National Bank*, 219 N. Y. 1; *Douglas* v. *Federal Reserve Bank*, 271 U. S. 489, 493).

3. The defendant was a holder in due course under negotiable instruments law.

So far we have treated the issue from the standpoint of the law of agency and equity. The same result is reached under the law of negotiable instruments. Section 91 of the New York Negotiable Instruments Law (Laws 1909, Chap. 43) defines a holder in due course to be

"a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) That he took it in good faith and for value; (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The checks were plainly complete and regular upon their face. They were all payable on demand, and none was dis-

honored. Indeed, all but two had been certified. Title vested in the defendant immediately upon their deposit. *Douglas* v. *Federal Reserve Bank*, 217 U. S. 489, 492. We have already shown that the defendant took them in good faith and for value. Subdivision 4 of Section 91 must be read in connection with Section 95, which provides:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The defendant had no actual knowledge of any infirmity or defect in the checks. Neither their form nor the circumstances of their negotiation by Cahan, Jr. made the defendant guilty of bad faith in receiving them for his account.

There is no distinction between the checks naming the defendant as payee and those naming Cahan, Jr. A payee as well as an endorsee may be a holder in due course. *Armstrong* v. *American Exchange Bank*, 133 U. S. 433, 453; *Boston Steel & Iron Co.* v. *Steuer*, 183 Mass. 140, 143; *Colonial Fur Ranching Co.* v. *First National Bank*, 227 Mass. 12, 14; *Bergstrom* v. *Ritz Carlton*, 171 App. Div. 776, 781, appeal dismissed 220 N. Y. 569; *Drumm Construction Co.* v. *Forbes*, 305 Ill. 303, 307; *Johnston* v. *Knipe*, 260 Pa. 504; and *Brannan's The Negotiable Instruments Law*, 3 ed., pp. 52 53.

II. The Court below applied an erroneous criterion of notice.

Regarding the matter as one of business convenience, the Court below said:

"It is never doubted that if a bank of deposit has notice which would lead that fiction of the law a 'reasonable man' to suspect wrong, the bank which fails either to verify or dispel that suspicion is answerable for the results" (p. 278).

"There are indeed cases in which it might be in the principal's interest for the agent to withdraw funds from the principal's account and deposit them in his own account, even in a bank of the same city or in the same bank. The only case we can think of is one in which the agent wanted to conceal his principal's name in a transportation in which even a cashier's check might excite suspicion. But the payment of the agent's own debt might in fact be a part of such a transaction, and that possibly does not seem to us sufficient justification. We must balance probabilities and conclude that we hold the form of the check should be taken as evidence that the agent is engaged upon ventures of his own, and as to his authority to conduct the same the bank must assume the risk of investigation" (p. 281).

This is not the criterion of notice which Judge Hough asserted in writing for the Court below in *Gerseta Corporation* v. *Wessex Campbell Silk Co.*, 3 Fed. (2d) 236, 238:

"We conclude that the statute means and says that under section 91, a holder must take in good faith, but if he does not take in bad faith, his good faith is sufficiently shown, and bad faith under section 95 means that he must have knowledge of facts which render it dishonest to take the particular piece of negotiable paper under discussion. Knowledge, not surmise, suspicion, or fear, is necessary; not knowledge of the exact truth, but knowledge of some truth that would prevent action by those commercially honest men for whom law is made."

Nor does it accord with his quotation in that case from *Cheever* v. *Pittsburgh, etc., Co.*, 150 N. Y. 59, 65, as follows:

"Further the transferee holder 'is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. * * * The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail.'"

Moreover, it is contrary to the doctrine of notice formulated by this Court.

In *Murray* v. *Lardner*, 2 Wall. 110, 121, this Court held:

"Suspicion of defect of title or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession."

This doctrine was reaffirmed in *Hotchkiss* v. *National Banks*, 21 Wall. 354, 359, where Mr. Justice Field said:

"A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title."

III. The judgment herein should be reversed.

Respectfully submitted,

VANVECHTEN VEEDER,
WILLIAM LEE WOODWARD,
WILLIAM J. DEAN,
Counsel for Petitioner.

April, 1927.

Appendix

Privy Council Appeal No. 9 of 1926.

THE CORPORATION AGENCIES, LIMITED.....*Appellants*

v.

THE HOME BANK OF CANADA.....*Respondents*

FROM

THE SUPREME COURT OF CANADA.

X JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, delivered the 18th JANUARY, 1927.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
LORD WRENBURY.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WRENBURY.]

The appellants, Corporation Agencies, Limited (hereinafter called the Company) are a limited company incorporated under the statutes of Canada. They carried on business in the city of Montreal as registrar and transfer agents for registering and transferring shares of the capital stock of certain commercial companies and agents and trustee and financial agents in reconstruction of certain companies. The Merchants' Bank of Canada were their bankers. The Presi-

* Not reported [1927] A.C. 318

dent of the Company was one C. H. Cahan, Senior, one of His Majesty's Counsel, a lawyer of wealth and position in Montreal. His son, C. H. Cahan, Junior, who was also one of His Majesty's Counsel, was a director of the Company. One B. F. Bowler was Secretary-Treasurer. The respondents, the Home Bank of Canada, were the bankers of Cahan, Junior. Between the plaintiff Company and the defendant bank no relation, contractual, fiduciary or other, existed, save such as arose from the transactions presently mentioned.

This action was brought by the Company against the defendant bank, claiming payment of a sum of $209,028.12 (afterwards corrected to $205,960.37), being the amount of 94 cheques amounting to the sum last above-mentioned drawn upon the Company's account with the Merchants' Bank of Canada, collected by the defendant bank through the Montreal Clearing House, and debited to the Company's account with the Merchants' Bank. These 94 cheques were drawn at various dates between the 29th March, 1919, and the 20th December, 1919, and were as follows:

Number of cheques.	Amounts.
	$
In March, 1919—One cheque	500.00
" April, 1919—Three cheques	1,096.89
" May, 1919—Nine cheques	4,728.75
" June, 1919—Seven cheques	9,680.00
" July, 1919—One cheque	3,500.00
" Aug., 1919—Two cheques	1,850.00
" Sept., 1919—Ten cheques	14,668.96
" Oct., 1919—Twenty-one cheques	46,445.00
" Nov., 1919—Twenty-six cheques	79,220.27
To 20th Dec., 1919—Fourteen cheques .	44,270.50
Total—Ninety-four cheques ...	$205,960.37

Cahan, Junior, who, as already stated, was a director of the Company, was during 1919 engaged in very extensive speculative dealings in stocks and shares on his own private account, and he in fraud of the Company made use of the Company's account with the Merchants' Bank of Canada to assist his operations.

There is a device known in Canada as "kiting," which is described as follows:

"Kiting is a term used with regard to obtaining money by cheques passed through banks without value being deposited against the cheque—that is, kiting is an effort to obtain the use of money during the process of a cheque passing through one bank or through a clearing house to another, and perhaps through many more."

To this Bowler, who was examined as a witness for the defendant bank, adds that kiting is a means of getting credit for the time it takes to clear a cheque from one bank to another bank. Cheques are passed from one bank account to another, and credit is obtained at the bank into which they are paid, for which they are debited at the bank on which they are drawn.

During 1919 Cahan, Senior, was much engaged in business which took all his attention off the proceedings of the Company. Cahan, Junior, and Bowler were substantially in complete control of the Company's affairs, and it was in that state of things that the frauds of Cahan, Junior, which it is necessary to describe, were perpetrated.

The Company's bye-laws contained a bye-law as follows:

"54. Contracts and engagements on behalf of the Company may be made, and cheques, bills of exchange, promissory notes, drafts and other negotiable paper may be made, drawn, accepted or endorsed by the Secretary-Treasurer acting jointly with the Manager or with any Director of the Company, or by the Manager acting jointly with any Director of the Company; or by any two Directors acting together;

provided, however, that cheques, drafts, bills of exchange, promissory notes or other negotiable paper may be endorsed for deposit only in the Company's bank account by either the Manager or the Secretary-Treasurer acting alone."

The following is a copy of the first of the cheques in question, that of the 29th March, 1919:

No. 6080. Montreal, Mar. 29, 1919.

Corporation Agencies, Limited.

Pay to the order of C. H. Cahan, Junior, $500.00 Five Hundred Dollars.

Corporation Agencies, Limited.
C. H. Cahan, Junior, Director.
B. F. Bowler, Secretary-Treasurer.

To the Merchants' Bank of Canada,
Montreal.

Of the 94 cheques, 67, amounting to $146,429.87, were drawn as above; six, amounting to $16,530.50, were similar, except that they were drawn payable to the order of the defendant bank. The rest, 21 in number, amounting to $43,000, were drawn in the same way and were made payable to Cahan, Junior, or to agents of his, or to bearer. A few of the cheques, some 18 in number, were cashed over the counter. In all other cases the cheques were duly endorsed and were paid into Cahan Junior's account with the defendant bank, and were collected in ordinary course by the defendant bank through the Montreal Clearing House from the Merchants' Bank of Canada. In the case of six cheques, "E. Wright, Director," instead of B. F. Bowler, was the second signature in addition to that of Cahan, Junior. No importance is attributed to this fact.

On the night of the 26th-27th December, 1919, Cahan, Junior, absconded, and his whereabouts were subsequently unknown. The facts of the frauds he had committed then came to light.

Cahan, Junior, held a power of attorney from his father to draw upon three banking accounts which his father had, in each of which there was a substantial credit balance. He had also power to draw on the banking accounts of several companies. He was thus in a position to draw on some twelve banking accounts or more and to carry on "kiting" operations, and did so to a very large extent. The general effect of his operations may be described as follows: He and Bowler (who was throughout a party to his proceedings) drew a cheque on the Merchants' Bank of Canada. Cahan, Junior, paid it into his own private account at the defendant bank. At the moment when they drew that cheque there was in most cases no sufficient balance at the Merchants' Bank to meet it. But on the same day Cahan, Junior, paid into that account a cheque drawn by him on some of the other accounts on which he had power to draw, with the result that the plaintiffs' account with the Merchants' Bank was or at any rate became by the end of the day in credit to an amount sufficient to meet the cheque in his favour. An illustration may be given by taking the case of the first cheque, that of the 29th March, 1919, for $500. On the 29th March the credit balance at the Merchants' Bank was only $61.74. The cheque of the 29th March was cleared on the 31st March. On the 29th March $270 and on the 31st March $250 were paid by Cahan, Junior, into the credit of the account, with the result that on the 31st March there was enough to meet the cheque for $500 and to leave a credit balance of $81.74. This is a fair sample of what was done throughout. The 94 cheques were never met by moneys of the plaintiffs. Cahan, Junior, simply paid in and drew out money which he was obtaining by fraud from his father's accounts or the other accounts which have been already mentioned. The plaintiffs' account with the Merchants' Bank was never overdrawn

except on one or two occasions to very small amounts. The cheques that came in and went out always offset each other. From March to December, 1919, no more than $5,890.34 was paid into the Merchants' Bank and $8,402.35 drawn out in respect of the regular business of the Company. The difference between these two sums came out of the funds irregularly deposited by Cahan, Junior.

During the whole of that time the Company was practically dormant. All the rest of the payments into the account and the whole of the amount which was by the 94 cheques drawn out of the account had nothing to do with the Company's business or the Company's moneys. The trial Judge found as a fact that none of the 94 cheques were paid out of the Company's funds.

Having thus sketched the facts upon which the question arises, their Lordships go on to consider what is the law applicable to the case. The question here is whether the defendants had notice or knowledge. This is question of fact. In *John* v. *Dodwell*, 1918, A. C. 563, 569, Lord Haldane, in delivering the judgment of this Board, said, "When an agent is entrusted by his principal with property to be applied for the purposes of the latter and to be accounted for on that footing, he is . . . in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal." And again at p. 570, "If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondents." In *John* v. *Dodwell*, Williams, the manager for Dodwell and Co., who was authorized by Dodwell and Co., the plaintiffs (respondents) to draw, and who drew the cheques on the plaintiffs'

account, employed the defendants (appellants) as his brokers and gave them cheques on the plaintiffs' account in payment for shares, and they received them with knowledge that Williams, without apparent authority, was drawing for his own purposes on the plaintiffs' funds. The case turned, as does the present case, on knowledge. If there was no knowledge, it has no application.

By virtue of article 54 of the Company's bye-laws Cahan, Junior, as a director, and Bowler as secretary-treasurer, were authorized to draw on the Company's account at the Merchants' Bank of Canada, and they did so. Mr. Justice Maclennan, the Judge before whom the action was first tried, considered that the form of the cheques on their face was notice of the fact that Cahan, Junior, was appropriating to his own use the Company's moneys. Mr. Justice Duff and Mr. Justice Newcombe (the minority Judges on the appeal) were of the same opinion. Their words are "having notice, of which the cheques themselves were *prima facie* evidence, that Cahan, Junior, the defendants' endorser, was not entitled to the cheques." And again, "The cheque on its face is evidence of the absence of authority for the exercise of his powers for a purpose which is incompetent to him." Their Lordships do not agree. In their opinion, the majority in the Supreme Court were right in holding that the form of the cheques did not give notice and that the defendants had not notice.

For by way of illustration, take again the first cheque, that for $500, of the 29th March, 1919. When Cahan, Junior, paid that cheque into his account at the defendants' bank, suppose the bank had asked, "For what is this cheque given?" would he have been bound to answer? The cheque might have been for salary or for a sum due to Cahan, Junior,

on any other account. The defendant bank had no duty to enquire as to the obligation in respect of which it was given. They would in ordinary course of business take the cheque and if on presentation to the Merchants' Bank payment were refused, they would debit their customer with the amount.

During April three like cheques for $300, $498.74, and $298.15, were endorsed and handed to the defendant bank by Cahan, Junior. The practice of the Merchants' Bank was not to issue a pass-book, but to render monthly accounts. Such monthly accounts were duly rendered for March and April, 1919, to the Company. These contained the cheques above referred to. Thus the plaintiffs knew (so far as the defendant bank had knowledge or reason to believe) that the March and April cheques, drawn as they were in favour of Cahan, Junior, were being accepted by the Company as being on their face in order. And so matters went on during the subsequent months, and *a fortiori* the defendant bank had every reason to believe, as successive monthly accounts were sent and no objection raised, that the cheques were legitimate and not in fraud of the Company. The Company were, unfortunately for them, in the hands of fraudulent agents, but the defendant bank had neither knowledge nor notice that that was so, and, in fact, from the unquestioned acceptance of the monthly accounts, were entitled to believe the contrary.

Moreover, the fact was that the plaintiffs' moneys were not being appropriated and applied by Cahan, Junior, at all. His father's moneys and the moneys of the various companies on whose accounts he was entitled to draw and did draw were no doubt being misappropriated, but so far as the plaintiffs were concerned Cahan, Junior, was doing no more than paying into their account moneys which did not belong to them and drawing out to the like amount moneys with which the

Company, in fact, had no concern. Neither the payments into nor the drawings out of the Company's account were authorized acts. The Company cannot repudiate the one and take the benefit of the other. They are, in fact, not concerned with either. The plaintiffs lost nothing by the kiting transactions. If they now recovered the $205,960.37 from the defendant bank they would be making that sum as a profit if they kept it, and if they did not keep it, but were compelled by action brought by those whom Cahan, Junior, defrauded to pay it over to Cahan, Senior, or others whom Cahan, Junior, defrauded, they would be giving effect to rights whose existence the Board cannot in this proceeding investigate or determine, and with which in this proceeding they have nothing to do, for Cahan, Senior, and the companies concerned are not parties to this litigation.

Upon both grounds, viz., that the defendant bank had not notice or knowledge and that, in fact, the Company have sustained no loss, their Lordships are of opinion that the majority in the Supreme Court are right, and that this appeal must be dismissed with costs.

They will humbly advise His Majesty accordingly.

FIL
APR 1
WM. R. STA

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 318

EMPIRE TRUST COMPANY,
Petitioner-Defendant,

against

CHARLES HAZLITT CAHAN,
Respondent-Plaintiff.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGHES, ROUNDS, SCHURMAN & DWIGHT,
Attorneys for Respondent,
100 Broadway,
Borough of Manhattan,
New York City.

CHARLES E. HUGHES, JR.,
AUGUSTUS L. RICHARDS,
BERTRAM F. WILLCOX,
Of Counsel.

Pandick Press, Inc., 32 Thomas St., New York, U. S. A.

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Supreme Court of the United States

EMPIRE TRUST COMPANY,
Petitioner-Defendant,

against

CHARLES HAZLITT CAHAN,
Respondent-Plaintiff.

October Term,
1925.
No. 1055.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The decision of which petitioner seeks review by writ of *certiorari* was rendered by the Circuit Court of Appeals for the Second Circuit (Judges Hough, Learned Hand and Mack sitting) on January 4, 1926. It is reported in 9 F. (2nd) 713, and is printed at pages 266-285 of the Record. It affirmed, except as it directed a modification so as to add interest to the amount of the recovery, a judgment of the District Court for the Southern District of New York in favor of the plaintiff below entered on a verdict directed by the Trial Judge (Judge Winslow) on cross motions for directed verdicts made by both parties at the conclusion of all the evidence, pursuant to stipulation entered into at the opening of the trial providing therefor and that the case should be tried before a jury of one (Record, pp. 29, 153). Judge Winslow's opinion is not reported but appears at pages 241-244 of the record.

For convenience, we shall adopt the terminology of the petition and refer to the petitioner as "defendant" and respondent as "plaintiff."

Statement.

The statement of facts in the Petition, while summary, is on the whole fair and accurate. Reference must be made, however, to certain features of the case which defendant's statement does not develop, but which in our view have an important bearing on the extent of the notice to be imputed to defendant that Cahan, Jr., was using his principal's funds for his own purposes.

When the second check in this series, that of August 2, 1916 (Pl.'s Exh. 5-A, Record, p. 164) was presented to defendant by Cahan, Jr., for deposit in his personal account, it was pointedly brought by the teller to the attention of a responsible officer of the defendant, Mr. Lyon. He testified (Record, pp. 141-143) that a rule of the bank prevented the depositor from drawing against a check, even if certified, the same day on which it was deposited, unless it was approved "for immediate credit" by an officer. Cahan, Jr., on August 2, 1916, asked that the $5000 check deposited on that day be taken as a "cash item" for immediate withdrawal and the receiving teller in accordance with the rule brought it for approval to Mr. Lyon, who, after seeing the whole check, approved it without inquiry.

When the next check of the series in question, that of $2,000, on September 1, 1916 (Pl.'s Exh. 5-B, Record, p. 165), was presented by Cahan, Jr., for deposit, he apparently did not secure its approval "for immediate credit." Nevertheless, the transcript of Cahan, Jr.'s account with

defendant (Pl.'s Exh. 11, Record, pp. 197-214) shows (last item on p. 204) that he made a withdrawal on that same day of such an amount that his account would have been overdrawn but for this deposit. Whether the account was technically overdrawn,—*i. e.*, whether the withdrawal preceded the deposit,—cannot be determined from the transcript of the account, and Mr. Banks, defendant's auditor, testified that he could not tell (Record, pp. 115-116). The same situation appeared on April 12, 1917, and May 26, 1917 (transcript of account, Record, pp. 209, 210) when there were withdrawals which would have overdrawn Cahan, Jr.'s account but for deposits on the same day of his principal's funds. The only difference between these and the September 1, 1916, transaction is that in the account these deposits appear on a line above the withdrawals, which Mr. Banks testified was some indication that the deposit preceded the withdrawal (Record, pp. 104-105, 111-113). But in view of his other testimony as to the manner in which deposits and withdrawals were entered on defendant's books (Record, pp. 117-120) this was of slight probative value as to the actual chronology.

As to these three occasions the Trial Judge found in his opinion (Record, p. 243):

> "Whether the checks were drawn to pay the agent's indebtedness to the defendant (which would seem to be the case in three instances referred to) • • • •."

It must be taken as established that all of the checks sued on were frauds by Cahan, Jr., against the plaintiff, his father. Plaintiff's undisputed testimony to this effect (Record, pp. 44, 46, 48-49, 76-77) was corroborated by the

fact that Cahan, Jr., covered up these checks by false entries on the stubs of the plaintiff's check books or by omitting such entries entirely (Record, pp. 49-60, 63-75; Pl.'s Exhs. 6 to 6-J, pp. 183-185). While plaintiff testified as defendant says (Petition, p. 5) that he had no knowledge of exactly what Cahan, Jr., did with these funds, he did know and testified explicitly that the proceeds of these checks were not withdrawn or used for any purpose of the plaintiff (Record, pp. 88, 91-92) and the inference is clear that Cahan, Jr., misappropriated them to his own use.

There is no evidence that the defendant ever inquired of the plaintiff, or of anyone else, as to Cahan, Jr.'s authority to draw these checks or to dispose of them for his own benefit.

It must be remembered that both parties made cross motions for directed verdicts at the conclusion of the trial. This procedure had the effect of submitting all disputed questions of fact to the Trial Judge. His direction of a verdict therefore settled all material facts, and all justifiable inferences therefrom, in the plaintiff's favor. *Beuttell* v. *Magone*, 157 U. S. 154, 157-158; *Empire State Cattle Co.* v. *Atchison Railway Co.*, 210 U. S. 1, 8-9; *Sena* v. *American Turquoise Co.*, 220 U. S. 497.

We may therefore conclude this discussion of the facts with a quotation of three other passages from the opinion of the Trial Judge, which amount to findings of fact on his part, binding upon the appellate courts unless they were not supported by any evidence, which of course was far from the case.

> "The proceeds of the checks thus deposited with the defendant were used by Cahan, Jr., for his per-

sonal use and benefit, and not for the benefit or account of the plaintiff" (Record, p. 242).

* * * * * *

"The agent did not in fact have actual authority either to draw these particular checks or to deposit them to his personal credit with defendant" (p. 242).

* * * * * *

"Even if the actual good faith of the defendant be not questioned, the form of the checks should have led the defendant to inquire, in which event the real facts would have come to light. Failure to make this inquiry amounts to 'bad faith', in a commercial sense" (p. 243).

POINT I.

The decision of the Circuit Court of Appeals herein does not require review by this Court.

That the question decided is important we do not deny. But we take direct issue with the statement in the petition (p. 6) of the alleged reasons for review.

No question of local law is involved and therefore the alleged conflict between the decision and the law as laid down by the New York State courts presents no special ground for review. The New York decisions are of course entitled to consideration, with those of other states, in determining whether the decision is in conflict with the weight of authority.

It is to this question, and to the question whether there is any substantial conflict between the circuit courts of appeals of different circuits, that our argument will be specifically addressed.

1. *There is no substantial conflict between the decisions of the various circuit courts of appeals "on the same matter."*

Briefly our position is that the statement in the petition that this decision is in conflict with the law as declared by the Circuit Courts of Appeals for the Third, Sixth and Ninth Circuits is demonstrably erroneous; that the only decision of a federal appellate court which is even apparently inconsistent with the principles laid down by the Court herein is *Santa Marina Co.* v. *Canadian Bank of Commerce*, 254 Fed. 391 in the Ninth Circuit; and that there were features in this case which distinguish it from that one.

The decision below laid down no new principle of law. It is simply an interesting application of the ancient rule that a third person who receives funds from an agent, with knowledge or notice of the fiduciary relationship with respect to those funds and of such facts as should lead him to suspect that the principal probably did not intend that he should receive them, takes the funds at his peril.

What is sufficient notice to put the third person upon inquiry is always a question of degree. The authorities are unanimous in holding a bank or other person conclusively liable if it takes a check, drawn by an agent in the name of his principal, in payment of the agents' individual indebtedness to it. *National Bank* v. *Insurance Co.*, 104 U. S. 54, *Ward* v. *City Trust Co.*, 192 N. Y. 61, *Rochester & C. T. R. Co.* v. *Paviour*, 164 N. Y. 281, and *Gerard* v. *McCormick*, 130 N. Y. 261, are illustrative cases of this universal rule, which is not denied by defendant (Brief, p. 9). But the reason for this result is not that the debt is paid, but that this circumstance is a strong indication that the agent is using his principal's funds for his own purposes with-

out authority. Even in this situation there is no certainty of wrongdoing. It is entirely possible that, by reason of a collateral transaction between the agent and the principal, the agent is entitled to use the principal's funds for his own purposes. But this possibility is remote and, on a balance of probabilities, the courts all hold that such a transaction is so suspicious that the taker of the funds is put upon inquiry.

It is only another application of the fundamental rule above stated to hold, as in the instant case, that a bank is put on notice where an agent deposits checks showing on their face that they represent funds belonging to his principal to the credit of the agents' individual account. The natural and probable consequence of the transaction is that the agent will use the funds to satisfy his private obligations, or otherwise for his individual purposes. Again there is a possibility that the transfer of the funds from the principal's account to the personal account of the agent may be with the former's authority. But again the possibility is remote. It is difficult to assign a rational explanation of what purpose of the principal's such a transfer would subserve. Defendant says (Brief, p. 11) that "the deposit with the defendant bank did not operate to take the funds out of his son's control." But it did operate to take the principal's funds out of the principal's control. While the funds were on deposit with the Guaranty Trust Company and the Agents of the Bank of Montreal, the plaintiff could draw checks upon them himself. He could also, by mere revocation of the powers of attorney, deprive Cahan, Jr., of all power over them. But once they were transferred to Cahan, Jr.'s individual account with the defendant, the plaintiff's control over them ceased. The

defendant bound itself by its contract of deposit to honor any check that Cahan, Jr., might draw and none which anyone else, including his principal, the plaintiff, might draw.

The decision in the instant case did not even present any novel application of established principles. Its result was clearly foreshadowed by the opinion of the same court as early as 1913 in *Havana Central Railroad Co.* v. *Central Trust Co.*, 204 Fed. 546, which this Court declined to review by certiorari (234 U. S. 755). That decision is a striking illustration of the fact that the question of the liability of a bank in dealing with commercial paper drawn by a known agent is always a question of degree,—of the extent of notice. That was an action against the bank in which the principal carried its account and on which the agent, a corporate officer, drew checks in the name of his principal, by himself as agent, to his own order. (We shall for brevity refer to a bank in such position as the "drawee bank" and the bank in which the agent deposits the check to his individual credit as the "agent's bank".) The Circuit Court of Appeals held that the defendant (the drawee bank) was not liable for paying such checks in the circumstances disclosed in that case, among them the fact that checks similarly drawn had gone through without question, that the form of the checks was consistent with an innocent purpose, and that the *drawee bank* was not in a position to know what the agent's purpose was. But the court said (p. 551) that it was "far from holding that a bank is free under all circumstances to pay without question checks drawn by corporate officers to their own order", and that "a check misused by a corporate officer cannot be regarded by a bank having notice of its

misuse as an authorized order." However, said the Court (p. 550):

> "*The defendant* (the drawee bank) did not know the history of the checks. It did not have *the knowledge of the Knickerbocker Company* (the agent's bank) that the Treasurer was using the checks for his personal benefit."

and at page 551:

> "But if the bank have knowledge that the officer *is using the check for his personal benefit*, e. g., to pay his debt to the bank *or to deposit it to his personal credit*, then the bank is put upon inquiry and if it fail to make it, pays at its peril." (Italics ours).

It is not necessary to repeat here the explanation by the Court below in its opinion (Record, pp. 272-276) of the extent of its ruling in the earlier case and the relation thereto of the *Havana Central* litigation in the State courts of New York.

Defendant's basic position (Brief, p. 10) that "the form of the checks drawn to the agent's order imported ownership of the proceeds in Cahan, Jr.", had been repudiated as early as 1888 by Judge Wallace in *Anderson* v. *Kissam*, 35 Fed. 699, 703, where, distinguishing the case in which an agent comes with money in hand, he said:

> "When he comes with money obligation of a corporation, which is the contract of a corporation only because he has made it, and which is not its contract if he has made it without authority, the transaction is a very different one. * * * No principle

> of the law of agency is better settled than that no person can act as the agent for another in making a contract for himself."

This is an application of the well-established rule that into every power of attorney to an agent to act "for", "on behalf of" or in the "name, place and stead of" a principal, the law reads the limitation that such power of attorney is not to be construed as including authority to use it for the agent's own benefit unless there be express language to that specific effect. *Stainer* v. *Tysen*, 3 Hill (N. Y.) 279; *Bank of New York* v. *American Dock & Trust Co.*, 143 N. Y. 559, 564; *Porges* v. *United States Mortgage & Trust Co.*, 203 N. Y. 181; *Park Hotel Co.* v. *Fourth National Bank*, 86 Fed. 742 (C. C. A., 8th Circ., per Sanborn, C. J.); 2 *Corpus Juris* 642, 643; 1 *Daniel on Negotiable Instruments*, Sec. 282.

We may now consider defendant's assertion that the decision of the Court below is contrary to the law as declared by the Circuit Courts of Appeals for the Third, Sixth and Ninth Circuits.

The only case cited from the Third Circuit is *Postal Telegraph-Cable Co.* v. *Citizens National Bank*, 228 Fed. 601, the facts in which bear no resemblance whatever to those of the instant case. It had to do with the drawee's liability on forged drafts. No question of agency or notice of an agent's use of fiduciary funds for his own benefit was presented. Indeed defendant makes no serious contention that the instant case conflicts with it, except with respect to the rule as to notice which we discuss hereafter.

Two cases are cited from the Sixth Circuit, neither of which conflicts with the instant case.

The first, *Warren-Scharf Asphalt Paving Co.* v. *Commercial National Bank*, 97 Fed. 181, protected the payment by the *drawee bank* to the "attorney and cashier" of a corporation of a check drawn by him upon its bank account to the order of "cash," a form of draft which he had customarily used for the purpose of meeting the company's pay-roll. The case was therefore of the same general nature as the *Havana Central* case in the Second Circuit, and is entirely consistent with it. Indeed there was even less basis for a criticism of the drawee bank's conduct than in the *Havana Central* case because the check was drawn not to the agent's own order but to the order of "cash."

In the other Sixth Circuit case, *Commercial Savings Bank & Trust Co.* v. *National Surety Co.*, 294 Fed. 261, one F. received a check to the order of "F., Trustee." He deposited it in his personal account with the defendant, but a few days later withdrew from that account a larger sum by a check to the order of "F., Trustee." The bank was held not liable for his misappropriation of these funds to which he at all times had legal title and over which he had exclusive power of disposition. The inapplicability of that case to the present is shown by the following reasoning of the Court (p. 264):

> " * * * even if the bank were to be charged with knowledge that it received this money from a trustee, it later returned the money to the same trustee, and certainly cannot now be held for the subsequent embezzlement of the funds, to the possession of which, in so far as this bank was concerned, the trustee was clearly entitled."

In the Ninth Circuit the law was early laid down in harmony with the result of the instant case in *Farmers' Loan*

& Trust Co. v. *Fidelity Trust Co.*, 86 Fed. 541. In that case the general agent of a corporation drew a draft upon its treasurer, and sold it to his bank for a certificate of deposit in his name as an individual. The Court, in holding that the bank was liable for the resulting misappropriation, said that if the agent had taken cash the presumption would have been that he was taking it for his principal's purposes, and continued (pp. 544-545):

> "But when the agent, for such a draft, asks for and receives from the bank a certificate of deposit in his individual name, not only is such bank thereby put upon inquiry as to why, for money of the principal, the agent wants such certificate in his individual name, but such conduct—nothing to the contrary appearing—is equivalent to a declaration by the agent that the money is received by him in his individual capacity, and for his individual use; for certainly the legal presumption that follows the deposit of money in the individual name of a man is that the money so deposited is the property of the depositor."

Defendant's attempt to distinguish this case (Brief, p. 17) is most ineffective. Why the giving of a certificate of deposit should be regarded as differing in effect from the entering of a deposit in an individual bank account is not obvious.

This brings us to the later decision of the Ninth Circuit in *Santa Marina Co.* v. *Canadian Bank of Commerce*, 254 Fed. 391, which this Court also ...d to review on certiorari, 250 U. S. 643. In that case one Hooper, an officer of a corporation, having authority to endorse and deposit checks payable to its order, endorsed in blank several such checks and deposited them in his individual bank

account with the defendant. The District Court (242 Fed. 142) held the defendant liable to the amount of those checks which were "deposited at a time when Hooper was indebted to the defendant bank in certain overdrafts" (254 Fed. p. 397), but not on the other checks. The plaintiff alone appealed and the Circuit Court of Appeals affirmed the judgment.

We regard that decision as incorrect and certainly it cannot be denied that it proceeds from a point of view at variance with that of the court in the present case. That case, however, was not, like this one, an action at law for conversion, but a suit in equity to charge defendant as a trustee, and the opinions both of the lower court (242 Fed. p. 145) and of the Circuit Court of Appeals (254 Fed. p. 396) indicate that considerable weight was attached to the form of the action. Moreover, there are circumstances in the instant case which in our view distinguish it.

We refer to the occasions above described on August 2, 1916, when one of this series of checks was presented by Cahan, Jr., "for immediate credit" and so brought for approval to one of defendant's officers, and on September 1, 1916, April 12, 1917, and May 26, 1917, when Cahan, Jr.'s, withdrawals were of such size that his account would have been overdrawn but for the deposit therein of his principal's funds. As to the August 2, 1916, transaction, which was presented as a whole to a responsible officer, it is difficult to imagine what necessity, consistent with faithfulness on the part of Cahan, Jr., that officer could have seen for having these funds marked specially for immediate withdrawal. Certainly it could not be the necessity of paying his principal's obligations. That could be done as well by checks on the principal's bank accounts. The necessity for

"immediate credit" must have been Cahan, Jr.'s, individually.

Again in the *Santa Marina Case* the plaintiff recovered to the extent of the deposits of the principal's funds made at a time when the agent's account with the defendant was overdrawn. We submit that no rational distinction may be drawn between that case and the situation with respect to Cahan, Jr.'s account with defendant herein on September 1, 1916, April 12, 1917, and May 26, 1917, when defendant honored Cahan, Jr.'s drafts on his personal account only because it received on the same day,—and probably at the same moment,—checks on his principal's funds drawn by the agent to his own order. The principle laid down in *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, that a bank which takes fiduciary funds in payment of the fiduciary's indebtedness to it, is so clearly put on notice that it is liable not only for that item but for all his subsequent defalcations, would be a sufficient ground for plaintiff's recovery herein of all except the amount of the first check of the series.

It is true that the features which we have above emphasized were not referred to by the Court below, which preferred to rest its decision on a broader ground. But they are in the case, and it is proper for this Court to consider them in determining whether the decision is in conflict with the decision of another circuit court of appeals "on the same matter". We submit that it is not.

Another important expression of opinion by a circuit court of appeals is quite in accord with the decision of the Court below. In *Oklahoma State Bank* v. *Galion Iron Works*, 4 F. (2nd) 337, the Circuit Court of Appeals for the Eighth Circuit said (pp. 338-339):

> "That an agent may not deposit funds collected by him for his principal with a bank to his own individual credit, and draw them for his own personal and private use, in the absence of authority from his principal is well settled, and when a bank with knowledge that its funds belong to the principal and not the agent, which was apparent from the face of the warrants, permits him to do so, it is liable to the principal for the moneys, thus deposited and withdrawn by the agent on his individual check and by him converted to his own use, and embezzled, unless the agent acted within the apparent scope of his authority, which is not claimed, or the principal, with knowledge of the acts of the agent permits him to do so, or ratifies his acts."

2. The decision is not untenable or in conflict with the weight of authority.

There is unquestionably a conflict of authority in the various state courts on the questions involved in this case. In some instances the decisions in a single state, notably New York, are not in harmony. But review of the decision in question by this Court would have slight effect upon such a wide divergence of views as are entertained by the state courts.

Coming directly to defendant's assertion that the decision is contrary to the law as laid down by the courts of last resort of New York, Massachusetts, Connecticut, Pennsylvania, Maryland, West Virginia, Missouri, California, Washington and England, we submit that the statement is exaggerated.

The decisions in Massachusetts (especially *Kendall* v. *Fidelity Trust Co.*, 230 Mass. 238) and Washingson (*Mott Iron Works* v. *Metropolitan Bank*, 78 Wash. 294) are in-

deed contrary to the principles upon which this case was decided, disregarding the particular circumstances above described.

However, the cases cited from Connecticut (*Goodwin v. American National Bank*, 48 Conn. 550), Pennsylvania (*Hood v. Kensington National Bank*, 230 Pa. St. 508, and *Safe Deposit & Trust Co. v. Bank*, 194 Pa. St. 334), West Virginia (*United States Fidelity & Guaranty Co. v. Home Bank*, 77 W. Va. 665), and California (*Southern Trust & Commercial Bank v. San Diego Savings Bank*, 212 Pac. 385, and *United States Fidelity & Guaranty Co. v. First National Bank*, 18 Cal. App. 437, neither of which, by the way, was a decision of the court of last resort) all had to do with the misappropriations of a fiduciary like an executor, administrator, guardian or town treasurer who had the legal title or the exclusive right of control of the fund. There is an important difference between these cases and those involving a mere agent. An estate can act only through its executor or trustee. Therefore in the case of an executor or trustee or other fiduciary who has the legal title or *exclusive* right of control, it may fairly be said that the control of the fund remains the same when it is deposited in the individual name of the executor or trustee. But a principal may act either personally or through other agents and therefore, if one agent deposits the principal's fund to his individual credit, the control is vitally changed. Then only *that* agent can act with respect to it. It is taken out of the control of the principal.

The case cited from Maryland (*Duckett v. Mechanics Bank*, 86 Md. 400) supports our position rather than defendant's. One of the two checks there involved was drawn to the order of a cashier for deposit to the order

of "C Trustee". The defendant bank permitted C to deposit this in his individual account. The court held the bank liable for the amount of this check, using the language which the court in the instant case quotes in its opinion (Record, p. 277). Certainly there is no difference in substance between that case and one in which the bank takes for credit to a fiduciary's individual account a check drawn by him as fiduciary to his own order.

The cases cited from Missouri strikingly illustrate the point that the question of the sufficiency of the notice is all one of degree and each case must rest upon the particular circumstances disclosed. In the first case cited, *McCullam* v. *Third National Bank*, 237 S. W. 1051, the Court holds, in a thoughtful opinion, that while the facts in a given case may frequently be such as to charge a bank with notice that a transfer by an officer of a corporation to his individual account was probably a misappropriation, the circumstances in that case indicated the contrary. There was evidence that a large part of the corporation's business was transacted through the officer's personal account, by reason of the fact that the corporation was failing and heavily indebted to its own banks. It was shown that another officer of the corporation knew and acquiesced in these transfers and indeed there was no proof that the officer in question had in fact misappropriated anything. *Gate City Building & Loan Assn.* v. *National Bank*, 126 Mo. 82, involved a similar state of facts. The "general fiscal agent" of the plaintiff association had a personal account and an association account with the same bank, the defendant. He had for a long time endorsed checks which had been made to the order of the association sometimes into one and sometimes into the other account,

without objection by the other officers, and had customarily adjusted the two accounts by drawing checks on his personal account to the credit of the association account. The other Missouri case cited, *State* v. *Chicago Bonding Co.*, 215 S. W. 20, is not at all in point.

The English cases cited by defendant (*Gray* v. *Johnston*, L. R. 3 Eng. & Ir. App. 1; *Coleman* v. *Bucks & Ozon Union Bank*, [1897] 2 Ch. 243, and *Shields* v. *Bank of Ireland*, [1901] 1 Ir. Rep. 222) all involve deposits by executors or trustees, who had the legal title. Those cases must be regarded as going off on that distinction because there is an important body of English law which supports the present decision. *Ex Parte Darlington District Joint-Stock Banking Co.*, 4 De G., J. & S. *581, *585-6; *John* v. *Dodwell & Co.*, [1918] A. C. 563, 568-9; *Ross* v. *London County Westminster & Parr's Bank, Limited*, [1919] 1 K. B. 678, 686; *A. L. Underwood, Ltd.* v. *Bank of Liverpool*, [1924] 1 K. B. 775. Defendant's attempt to distinguish the last-cited case (Brief, p. 16) cannot succeed. It is quite true that the checks as drawn imported ownership in the company. But the effect of Underwood's endorsing the checks as sole director and depositing them to the credit of his individual account was the same as Cahan, Jr.'s, drawing of the checks in the instant case and depositing them to his personal credit.

The condition of the New York authorities is peculiar. There are ruling decisions of the Court of Appeals which fully support the position of the plaintiff herein (*e.g.*, *Wagner Trading Co.* v. *Battery Park National Bank*, 228 N. Y. 37; *Porges* v. *United States Mortgage & Trust Co.*, 203 N. Y. 181, and *Sims* v. *United States Trust Co.*, 103 N. Y. 472, the last-cited case being particularly apposite to

the three checks which Cahan, Jr. drew, not to his own order, but directly to the defendant). Of the cases cited by defendant, *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106 and *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y. 225, involved trustees or other officers who had the legal title, and in the former case that fact was emphasized (218 N. Y., p. 110); *Havana Central Railroad Co.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422, the facts of which were substantially similar to those of the instant case, absolved the agent's bank from liability, not on the ground that the form of the checks did not impose on it a duty of inquiry, but on the ground that the drawee bank was the agent of the depositor to make representations as to the validity of the checks and that the agent's bank satisfied its duty by presenting them for payment; and in *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, a repetition of this admittedly erroneous doctrine was avoided only by announcing an equally unique and erroneous view of the effect of certification. We cannot improve upon the discussion of those cases in the opinion of the Circuit Court of Appeals itself (Record, pp. 274-276, 282-283). Certainly the fact that that Court felt constrained to depart from the extraordinary doctrines announced in those two decisions of the New York Court of Appeals furnishes no reason for its review by *certiorari*. It is fair to point out in a national court that the decisions of the New York Appellate Division have been uniformly in harmony with the decision of the Circuit Court of Appeals herein. *Havana Central Railroad Co.* v. *Knickerbocker Trust Co.*, 135 App. Div. 313; *Niagara Woolen Co.* v. *Pacific Bank*, 141 App. Div. 265, 268-9; *Newman* v. *Newman*, 160 App. Div. 331, 335; *Eyre* v. *Coal & Iron National Bank*, 208 App. Div. 686, 693-4, and *Spaulding* v. *Kelly*, 43 Hun, 301 (Gen. Term).

The other cases cited in the brief from jurisdictions which are not named in the petition (p. 6) as opposed to the holding herein are all distinguishable, on various grounds.

Besides the above cited New York cases, the decision of the Circuit Court of Appeals herein is supported by the most recent decisions of the courts of England, above cited, and by decisions of the courts of last resort of Tennessee (*U. S. Fidelity and Guaranty Co.* v. *People's Bank*, 127 Tenn. 720); Mississippi (*Bank of Hickory* v. *McPherson*, 102 Miss. 852), and Maryland (*Duckett* v. *Mechanics Bank*, 86 Md. 400, and see *Duckett* v. *Bank of Baltimore*, 88 Md. 8). See also *United States Fidelity and Guaranty Co.* v. *Adoue*, 104 Tex. 379.

3. *The decision is not contrary to the decisions of this court with respect to notice.*

Defendant's second point involves a misconception of the principles regarding notice which this Court has applied in the cases cited by defendant to purchasers of stolen negotiable paper. The Circuit Court of Appeals for the Second Circuit recognizes the rule laid down in those decisions in proper cases and has recently applied it. *Gerseta Corporation* v. *Wessex-Campbell Silk Co.*, 3 F. (2nd) 236; *Mack* v. *Dailey*, 3 F. (2nd) 534.

But the language of those decisions cannot properly be applied, in the way for which defendant contends, to cases such as the present. A bank is not entitled to close its eyes to notice of an agency relation and a probable misuse by the agent of his principal's funds, appearing *on the face of the instrument itself*. Indeed, failure to inquire into those circumstances involves "wilful ignorance" within the lan-

guage of the cases cited by defendant. As this Court said in *Angle* v. *Northwestern Mutual Life Insurance Co.*, 92 U. S. 330, 342:

> "Actual notice in such a case is not required, even in suits founded upon negotiable securities, where the evidence of its infirmity consists of matters apparent on its face; * * *
>
> "Constructive notice in such cases is held sufficient, upon the ground, that, when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence an act of justice."

The section of the New York Negotiable Instruments Law, cited by defendant, is but a codification of the common law, and the courts have always held that "bad faith in a commercial sense" includes a failure to inquire when the facts impose a duty of inquiry. *Rochester & C. T. R. Co.* v. *Paviour*, 164 N. Y. 281, 284; *Ward* v. *City Trust Co.*, 192 N. Y. 61, 70-71; *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y., 225, 233.

In none of this class of cases, where notice is imputed from the face and form of the check, is there any certainty that the agent's conduct involves misappropriation of funds. The question is always one of degree.

Even in that class of cases where the bank is universally held liable, where the agent uses a check drawn by himself on his principal's funds in payment of a personal indebtedness, there is always a possibility that he is entitled as against his principal so to do. In such cases the bank seldom acts in actual "bad faith" as defendant construes that term.

So when the agent deposits a check representing his principal's funds in his personal account to cover overdrafts therein, this may be with the principal's knowledge and authority. Indeed on defendant's theory (Brief, p. 11), that the agent's transfer of his principal's funds from the principal's account in one bank to the agent's individual account in another is no diversion but a proper deposit for the principal's purposes, this conclusion would be inevitable. The bank would be justified in regarding all withdrawals from the agent's account as *prima facie* for the principal's purposes. Therefore, if such withdrawals produced an overdraft it would be normal and proper to cover it by the deposit of other funds of the principal. But of course such reasoning flies in the face of probabilities and it is unquestioned law that in such cases the bank is liable. *Santa Marina Co.* v. *Canadian Bank of Commerce*, 254 Fed. 391; *Allen* v. *Puritan Trust Co.*, 211 Mass. 409.

In our view it is no less reasonable to hold that the bank is put upon inquiry at the moment the agent tenders his principal's funds, represented by an instrument of the agent's own creation, for deposit to his individual credit. Again there is a possibility that the transaction is innocent,—that the agent is really following his principal's instructions,—but that possibility again is relatively remote. The balance of probabilities is against the propriety of the transaction and it is no undue burden upon the bank to impose upon it the duty of making reasonable inquiry according to all the circumstances.

Such was the view of the Court below in the instant case, and its soundness, as a matter of public policy, is in no way affected by the principles laid down by this Court

as to what notice of circumstances *dehors* the instrument will affect the title of a purchaser of a stolen bill.

CONCLUSION.

The application for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
AUGUSTUS L. RICHARDS,
BERTRAM F. WILLCOX,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 318.

EMPIRE TRUST COMPANY,

Petitioner-Defendant,

against

CHARLES HAZLITT CAHAN,

Respondent-Plaintiff.

BRIEF ON BEHALF OF RESPONDENT-PLAINTIFF.

CHARLES E. HUGHES, Jr.,
AUGUSTUS L. RICHARDS,
BERTRAM F. WILLCOX,
HAROLD L. SMITH,
Counsel for Respondent.

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Supreme Court of the United States

EMPIRE TRUST COMPANY,
Petitioner-Defendant,

against

CHARLES HAZLITT CAHAN,
Respondent-Plaintiff.

October Term,
1926.

No. 318.

BRIEF ON BEHALF OF RESPONDENT-PLAINTIFF.

This writ of *certiorari* brings up for review a decision of the Circuit Court of Appeals for the Second Circuit (Judges Hough, Learned Hand and Mack sitting), which affirmed a judgment of the District Court for the Southern District of New York (Judge Winslow presiding) in favor of the plaintiff.

At the opening of trial the parties stipulated that the case should be tried by a jury of one and that at the conclusion of the evidence each party should move for a directed verdict (Record, fol. 86). Cross motions for directed verdicts were accordingly made by both parties (fols. 458-9) and the judgment was entered upon the granting by the Trial Judge of plaintiff's motion (fols. 464, 77-80).

The effect of the above procedure was to confer upon the Trial Judge the duty to resolve all questions of fact and to draw all legitimate inferences from facts, and his

decision on all disputed questions of fact is conclusive if there was any evidence to sustain it (*Beuttell* v. *Magone*, 157 U. S. 154, 157-8; *Empire State Cattle Co.* v. *Atchison Railway Co.*, 210 U. S. 1, 8-9; *Sena* v. *American Turquoise Co.*, 220 U. S. 497; *Baylies, New Trials and Appeals*, 3 ed., 71-72).

Statement.

It is unnecessary for us to present a complete statement of the case, since much of the ground is covered in the Statement of Facts in defendant's brief.

It must be taken as established that all of the twenty-one checks involved in this action were frauds on the part of Cahan, Jr., against the plaintiff, his father. Plaintiff's testimony is explicit that he never authorized or had any knowledge of any of them; that he never had any transactions with either Cahan, Jr., or defendant, by virtue of which any such amounts were properly payable to either of them; that he had no relations with defendant, as depositor or otherwise, and did not know of Cahan, Jr.'s account with it; and that no one of these checks was drawn for any purpose of plaintiff's (fols. 132, 136-138, 142-146, 226-230). As this testimony was uncontradicted, corroboration of it was unnecessary, but corroboration of the fraud appeared from the manner in which Cahan, Jr., covered up the transactions in the plaintiff's check books with the Agents of the Bank of Montreal and the Guaranty Trust Company, either by making no entry at all of the fraudulent check on any stub, or by entering on the stub a notation of a check of the same number as that of the fraudulent check but to a different payee and for a different amount (fols. 147-178, 187-

225; Pl.'s Exhs. 6 to 6-J, fols. 547-555). Thus the frauds remained undiscovered until after Cahan, Jr.'s precipitate disappearance on the night of December 26, 1919 (fols. 120-135).

While, as defendant says in its brief (p. 5), plaintiff did not definitely know exactly what Cahan, Jr., did with the funds after their deposit with defendant, he did know and testified explicitly that they were not used for any purpose of plaintiff, and the inference is clear that Cahan, Jr., misappropriated them to his own use (fols. 262-264, 271-275).

On this subject the District Judge found as follows:

> "The proceeds of the checks thus deposited with the defendant were used by Cahan, Jr., for his personal use and benefit, and not for the benefit or account of the plaintiff" (fol. 724).
>
> • • • • • •
>
> "The agent did not in fact have actual authority either to draw these particular checks or to deposit them to his personal credit with defendant" (fols. 725-6).

The District Judge also found that three of the checks were drawn by Cahan, Jr., to pay indebtedness of his to the defendant:

> "Whether the checks were drawn to pay the agent's indebtedness to the defendant (which would seem to be the case in three instances referred to) • • •" (fol. 727).

This finding was in response to plaintiff's contention that the deposit by Cahan, Jr., of three of the checks in question covered overdrafts in his account. We shall discuss

under Point Third the evidence upon this question, as well as other circumstances which in our view conveyed to defendant unusually direct notice of Cahan, Jr.'s, purposes.

It is conceded that defendant never inquired of plaintiff, or of anyone else, as to Cahan, Jr.'s, authority to draw these checks or to dispose of the same for his own benefit. There is no evidence that defendant had any knowledge of the powers of attorney. The circumstances under which these were given are described in the record (fols. 104-118).

Defendant's answer admits "that defendant collected each of said twenty one (21) checks from said Agents of the Bank of Montreal or from the Guaranty Trust Company of New York" (Par. Sixth, fol. 51); and "that after collection, the proceeds of each of said twenty-one (21) checks were placed to the credit of the personal account of said C. H. Cahan, Jr., with the defendant and said proceeds were thereafter withdrawn by said C. H. Cahan, Jr." (Par. Fifth, fol. 50). The defendant's answer also admits (Par. Third, fol. 48) the form of the checks, as alleged in Paragraph XI of the complaint (fols. 25-35). This includes the fact that the twenty-first check (referred to on page 4 of defendant's brief), dated October 15, 1918, for $2,400, was payable to the order either of C. H. Cahan, Jr., or the defendant (fol. 35).

Argument.

These twenty-one checks all bore on their face the badge of a fiduciary relation. They were all signed "C. H. Cahan, by C. H. Cahan, Jr., His Attorney." Seventeen of them were made payable to the order of C. H. Cahan, Jr., him-

self. Three were made payable to the defendant bank, with which the plaintiff had no relations, but in which Cahan, Jr., maintained his individual checking account. The twenty-first check was made payable in one of the above two ways.

It is unquestioned law that one who deals with fiduciary funds, with notice of their character, in such a way as to facilitate a misappropriation thereof by the fiduciary, is liable for such misappropriation. One who takes from a fiduciary a check signed by him in a fiduciary capacity is liable if he has knowledge or notice that the fiduciary's purpose is to use the funds for his individual benefit. The most familiar example is the taking of such a check in payment of the fiduciary's individual indebtedness to the recipient. The decisions are substantially unanimous in imposing liability in these circumstances, and so much is conceded by the defendant.

The Court below held that the same principles impose liability upon a bank which permits an agent to deposit checks signed by him as agent in his individual bank account. The view of the Court below is that the form of the checks and the agent's direction to deposit them to his individual account are sufficient notice of probable misfeasance to put the bank upon inquiry. The contrary view, advanced by defendant, is that, in spite of appearances, the bank is entitled to presume that the agent's intentions and his use of the funds are innocent.

But there are only two assumptions upon which propriety in such circumstances might be predicated, (1) that the agent is entitled to the money in his own right, or, (2) if not, that he will use the funds, though in his individual account, for his principal's purposes. Plainly the first as-

sumption may not be indulged, because it would apply as well to the case in which the agent uses the funds to pay his individual indebtedness, and it is universal law that such a transaction may not be presumed to be innocent. But the second assumption involves even more serious conflict with probabilities. The principal has his own bank account on which checks for his purposes may be drawn. As Judge Hough said in the Court below, the only case in which the principal's interests would be served by a withdrawal of funds from his own account to the individual account of the agent would be one in which it was important to "conceal his principal's name in a transaction in which even a cashier's cheque might excite suspicion" (R. p. 281).

The Court below then based its decision upon an affirmative answer to the broad question which it phrased thus (R. pp. 269-270):

> "Is an agent's bank of deposit put on notice by, and does it take at its peril if it receives without investigation, a cheque drawn by the agent on his principal's funds to his own order and tendered for the credit of his private account?"

We submit that the facts and circumstances disclosed by this record, which we shall discuss in Point Third, require the affirmance of this judgment, whether or not that broad principle be accepted. We propose first, however, to discuss the general question. We believe that the rule announced by the Court below is correct, and that its adoption by this Court would end much uncertainty in a branch of the law in which certainty is peculiarly desirable, and would promote the establishment by banking institutions throughout the country of a wholesome and convenient practice in their dealings with fiduciary funds.

FIRST: The deposit by a fiduciary in his individual bank account of checks which show on their face that they represent fiduciary funds is sufficient evidence of misappropriation to impose upon the bank a duty of inquiry.

In the discussion under this Point we shall disregard the particular character of the fiduciary whose acts are involved. We shall for the moment assume the correctness of defendant's contention (Brief, p. 14) that there is no distinction, so far as the liability of banks in which their funds are deposited is concerned, between trustees, executors, guardians and other fiduciaries who have legal title to funds, on the one hand, and agents and corporate officers who have no such title, on the other, and shall postpone discussion of this distinction and of defendant's authorities until Point Second, *infra*. Certainly decisions imposing liability in cases in which the fiduciary has the legal title are *a fortiori* authority in this case.

(a) The rule stated in the Point heading is sustained by many authorities in the Federal courts and in other jurisdictions and accords with well-established principles of notice adopted by this Court.

The following authorities sustain the rule stated in the point heading.

Farmers Loan & Trust Co. v. *Fidelity Trust Co.*, 86 Fed. 541 (C. C. A. 9th Circ.); *Havana Central Railroad Co.* v. *Central Trust Co.*, 204 Fed. 546 (C. C. A. 2nd Circ.); *Oklahoma State Bank* v. *Galion Iron Works*, 4 F. (2d), 337 (C. C. A. 8th Circ.)

Wagner Trading Co. v. *Battery Park National Bank*, 228 N. Y. 37; *Porges* v. *U. S. Mortgage & Trust Co.*, 203

N. Y. 181; *Sims* v. *U. S. Trust Co.*, 103 N. Y. 472; *Niagara Woolen Co.* v. *Pacific Bank*, 141 App. Div. 265; *Spaulding* v. *Kelly*, 43 Hun 301.

Taylor v. *Harris' Admr.*, 164 Ky. 654, 669-673; *Mitchell* v. *First National Bank of Hopkinsville*, 203 Ky. 770.

Duckett v. *Mechanics' Bank*, 86 Md. 400; *Duckett* v. *Bank of Baltimore*, 88 Md. 8.

U. S. Fidelity & Guarantee Co. v. *People's Bank*, 127 Tenn. 720.

Bank of Hickory v. *McPherson*, 102 Miss. 852.

U. S. Fidelity & Guaranty Co. v. *Adoue*, 104 Tex. 379, 392, 395.

A. L. Underwood, Ltd. v. *Bank of Liverpool*, [1924] 1 K. B. 775; *Ex Parte Darlington District Joint-Stock Banking Co.*, 4 De G., J. & S., *581, *585-6; *Ross* v. *London Co. Westminster & Parr's Bank, Ltd.*, [1919] 1 K. B. 678, 686.

Toronto Club v. *Imperial Trusts Co.*, 25 Ont. L. Rep. 330, 343.

On pages 8 and 9 of its brief defendant cites a large number of cases which, it argues, support the proposition that "it is almost universally held that a fiduciary, of whatsoever kind, may deposit the funds of his principal in a bank to his individual credit."

If this is intended to mean that the fiduciary has a right so to do, it cannot be accepted as the law, and very few of the cases cited support it. Professor Austin W. Scott in his article in 34 *Harvard Law Review*, 454 (upon which defendant relies), recognizes (p. 467) that "as a rule, the trust funds should be deposited in an account separate from that in which the trustee keeps his own funds, and the form of the deposit should be such as to indicate its fiduciary char-

acter; and according to the weight of authority if the bank becomes insolvent the trustee is personally liable if the trust fund was blended with the trustee's individual account; and even if there was no such blending he is liable if the deposit does not on its face indicate its fiduciary character." For collections of cases on this rule, which applies to all fiduciaries whether having the legal title or not, see 43 *A. L. R.* 600, Note; 1 *Perry on Trusts*, 4 ed. Sec. 443; *Ames', Cases on Trusts*, 484, Note. Such a form of deposit, at best, may seriously complicate the administration of the trust. In case of attachment by creditors of the fiduciary individually, or in case of the fiduciary's death, it will often require litigation to establish the rights of the beneficial owner. See *Matter of Union Trust Company*, 219 N. Y. 514, 521-522.

Defendant's contention must, therefore, rest not on any right of the fiduciary to make such an individual deposit, but on the proposition that, although the fiduciary has committed a breach of trust, the bank is not liable for permitting him to do so. Upon this question a comparison of the authorities cited by the defendant, with those above cited by us, shows that there is a wide conflict of authority throughout the country. Sometimes, as in New York, the decisions in the same jurisdiction appear inharmonious.

The cases in the national courts, however, have been fairly uniform. The Circuit Court of Appeals for the Ninth Circuit applied the rule to facts which, in spite of defendant's attempt, we submit are indistinguishable from the present, in *Farmers' Loan & Trust Co. v. Fidelity Trust Co.*, 86 Fed. 541. There the general agent of a corporation drew a draft upon its treasurer and transferred it to his bank for a certificate of deposit in his name as an individual.

The Court, holding that the defendant bank was liable for the resulting misappropriation, said (pp. 554-545):

> "When an agent draws a draft in the name of his principal, and receives from a bank the money therefor, the presumption, in the absence of any showing to the contrary, is that he receives the money in the same capacity in which he draws the draft; that is to say, as agent. But when the agent, for such a draft, asks for and receives from the bank a certificate of deposit in his individual name, not only is such bank thereby put upon inquiry as to why, for money of the principal, the agent wants such certificate in his individual name, but such conduct—nothing to the contrary appearing—is equivalent to a declaration by the agent that the money is received by him in his individual capacity, and for his individual use; for certainly the legal presumption that follows the deposit of money in the individual name of a man is that the money so deposited is the property of the depositor."

In *Havana Central Railroad Co. v. Central Trust Co.*, 204 Fed. 546, 551 (C. C. A. 2d Circ.) Judge Noyes said:

> "But if the bank have knowledge that the officer is using the check for his personal benefit, *e. g.* to pay his debt to the bank or to deposit it to his personal credit, then the bank is put upon inquiry and if it fail to make it, pays at its peril."

In that case the plaintiff corporation had a deposit account with the defendant, the Central Trust Company. Its Treasurer signed checks in the plaintiff's name, by himself as treasurer, payable to his own order, and deposited them in his individual account with the Knickerbocker Trust Com-

pany. The plaintiff's action against that bank, which corresponded on its facts to the present action, was in the New York State courts and, after the plaintiff had been successful in the Special Term and Appellate Division, finally resulted in a judgment for defendant (*Havana Central Railroad Co.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422). This decision of the Court of Appeals was upon the ground that, while the form of the checks was sufficient to put the depositary bank upon inquiry, that duty of inquiry was satisfied by the mere fact that the checks were paid by the Central Trust Company, upon which they had been drawn, which bank the Court said was the "agent" of the plaintiff to make representations to third persons as to the validity of checks drawn upon the plaintiff's account. The case in the Federal Court was against the Central Trust Company, upon which the checks had been drawn, which we shall refer to as the "drawee bank". The Circuit Court of Appeals took direct issue with the State Court upon the fundamental proposition that the primary responsibility was upon the drawee bank. Judge Noyes said (pp. 548-549, 550):

> "It is impossible to give the decision of the Court of Appeals a narrow interpretation. It was based upon the assumption that the Knickerbocker Company was put upon inquiry because the checks were drawn by the treasurer to his own order and were deposited to his personal credit. The inquiry involved two questions:
>
> "(1) The authority of the treasurer to draw checks of that kind.
>
> "(2) His authority to draw these checks and use them for his own purposes.

> "An answer to the first question would not have relieved the holder put upon inquiry. • • •
>
> "The defendant did not know the history of the checks. It did not have the knowledge of the Knickerbocker Company that the treasurer was using the checks for his personal benefit."

The Circuit Court of Appeals therefore held that under the facts of that particular case the *drawee bank* was not liable for honoring the checks. The same distinction is implicit in the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Warren-Scharf Asphalt Paving Co.* v. *Commercial National Bank*, 97 Fed. 181, which was also an action against the drawee bank, and involved a check drawn by a corporate officer upon its bank account to the order of "Cash".

Quite recently the rule which was applied in the instant case was enunciated by the Circuit Court of Appeals for the Eighth Circuit in *Oklahoma State Bank* v. *Golion Iron Works*, 4 F. (2d) 337, as follows (pp. 338-339):

> "That an agent may not deposit funds collected by him for his principal with a bank to his own individual credit, and draw them for his own personal and private use, in the absence of authority from his principal is well settled, and when a bank with knowledge that its funds belong to the principal and not the agent, which was apparent from the face of the warrants, permits him to do so, it is liable to the principal for the moneys thus deposited and withdrawn by the agent on his individual check and by him converted to his own use, and embezzled, unless the agent acted within the apparent scope of his authority, which is not claimed, or the principal, with knowledge of the acts of the agent permits him to do so, or ratifies his acts."

The only decisions of the federal courts upon which defendant relies are *Santa Marina Co.* v. *Canadian Bank*, 254 Fed. 391 (C. C. A. 9th Circ.), and *Commercial Savings Bank & Trust Co.* v. *National Surety Co.*, 294 Fed. 261 (C. C. A. 6th Circ.). The latter case is plainly not in point. There one F. received a check payable to the order of "F., Trustee". He did, it is true, temporarily deposit it in his personal account with the defendant, but a few days later he withdrew from his personal account a larger sum by a check to the order of "F., Trustee". The court said (p. 264):

> "• • • even if the bank were to be charged with knowledge that it received this money from a trustee, it later returned the money to the same trustee, and certainly cannot now be held for the subsequent embezzlement of the funds, to the possession of which, in so far as this bank was concerned, the trustee was clearly entitled."

The *Santa Marina* case is the only decision in the federal courts, of which we know, which supports defendant's contentions. We believe it to be incorrectly decided and to be out of line with the principles enunciated by this Court in its decisions that a bank is liable if it takes fiduciary funds in satisfaction of the fiduciary's individual indebtedness to it. *Duncan* v. *Jaudon*, 15 Wall. 165; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Union Stock Yards Bank* v. *Gillespie*, 137 U. S. 411.

The rule that where negotiable paper, bearing on its face the badge of a fiduciary character, is tendered in payment of the private debt of a fiduciary, the transaction is "*prima facie* wrongful" and the taker is bound to make inquiry as to the propriety of the fiduciary's conduct, is

practically universal. See article by Professor Scott, 34 *Harvard Law Review*, 454, 460-462, 474-475. According to some cases, of which *Gray* v. *Johnston*, L. R., 3 H. L. 1, cited by defendant, is the leading example, the reason is that benefit to the creditor is "designed or stipulated for." But according to the majority view, the feature of benefit to the recipient of the funds is immaterial, and the reason for the rule is that the use of the funds by the fiduciary to satisfy his individual indebtedness is clear evidence of use of the fiduciary funds for individual purposes. So Professor Scott says, "The result is the same whenever the circumstances are such as to make it evident that the transaction is for the personal benefit of the fiduciary."

The decisions of this Court have uniformly been based upon the second view above expressed. In the leading case of *Duncan* v. *Jaudon*, 15 Wall. 165, in which a trustee pledged as security for his personal indebtedness to two banks stock which stood in his name as trustee, this Court held that the banks were liable upon the ground that the nature of the transaction gave them "actual or constructive notice that the trustee was abusing his trust and applying the proceeds of the loans to his own use". This holding was based upon a decision of Mr. Chief Justice Taney, sitting in Circuit (*Lowry* v. *Commercial & Farmers' Bank of Maryland*, Taney's Circuit Court Decisions, 310), which laid down the rule that "if a party dealing with an executor has, at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured."

The fact that the test is notice of misappropriation rather than benefit received by the bank is made clear by

the decision of this Court in *Manhattan Bank* v. *Walker*, 130 U. S. 267. In that case the plaintiff through one J, her agent, placed a certain note of a third party and certain railroad bonds with the defendant bank on a special deposit, the bank giving J a receipt running to him as "agent" for the plaintiff. The bank never came in contact with the plaintiff, but had large dealings with J through various accounts which he kept as "agent" or "guardian". J's firm became indebted to the defendant bank and in this situation J discounted with it the above mentioned note and lent the proceeds to the firm by depositing it in its account with the defendant. J then persuaded the defendant to deliver the bonds to him for the purpose of negotiating a loan from another bank where he also had an account. Plaintiff sued the defendant bank for the value of both the note and the bonds. In the lower court (25 Fed. 247) Judge Hammond held the defendant bank liable for the value of the note, but absolved it from liability on the transaction with respect to the bonds on the ground that "participation in the profits of the fraud" is generally speaking a requisite to liability and that "mere reason to believe that the trustees were misapplying the assets" was not sufficient, citing (p. 255) *Gray* v. *Johnston*, L. R., 3 H. L. 1, *supra*. On appeal this Court held the defendant bank liable for both transactions saying with respect to the bonds (p. 279):

> "Knowing, from what passed between Maas and Judah, that the bonds were to be used to raise money for the benefit of Walker Sons & Co., and knowing that such use was an improper disposition of the bonds, unless the transaction were affirmatively and directly sanctioned by the plaintiff, the defendant became a party to the misappropriation of the bonds.

> It is immaterial, in this view, whether or not the defendant received any portion of the money loaned by the Bank of Commerce on the security of the bonds."

The decisions of American courts generally base the rule of liability in a case of the taking of fiduciary funds in satisfaction of or as security for an individual indebtedness of the fiduciary upon the ground of notice rather than that of benefit to the recipient of the funds. The leading case in New York, *Ward* v. *City Trust Co.*, 192 N. Y. 61, is typical. There the Court of Appeals said (pp. 69, 72-73):

> "The form of the check in question was notice to the trust company that Umsted was using the property of the corporation of which he was president, to pay the personal debt of himself and Kiefer in apparent violation of its rights. (*Rochester & Charlotte Turnpike Road Company* v. *Paviour*, 164 N. Y. 281; *Gerard* v. *McCormick*, 130 N. Y. 261; *Hathaway* v. *County of Delaware*, 185 N. Y. 368, 372.) • • •
>
> "If the check had been regular on its face, that is, if it appeared to have passed through the hands of the Hartman Company, and thence into the channels of commerce, as in a case relied upon by the respondent, then, even if offered in payment of his personal debt by one of the officers of the company, the taker without notice would have the right to assume that the relations of the various parties to the paper were what they appeared to be. (*Cheever* v. *Pittsburgh, Shenango & Lake Erie R. R. Co.*, 150 N. Y. 59, 66.) The case before us, however, is utterly different, for the check showed on its face that it did not belong to Umsted or Kiefer, but to the Hartman Company. As was said in the *Paviour Case* (*supra*): 'There was a shadow on the checks, and

the defendant could not, in good faith, accept them until it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicions which the facts should have aroused. One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint.' "

The question then is whether the deposit by a fiduciary in his current individual bank account of fiduciary funds, known to be such, gives the depositary bank, in Chief Justice Taney's language "reasonable ground for believing that he intends to misapply the money",—whether, in the language of the New York case above quoted, the bank in accepting them "did an act which it had reason to believe would affect the rights of a third party" and which accordingly it could not in justice to that party do until the "shadow on the checks" had been removed by proper inquiry.

On principle it is difficult to imagine clearer notice of probable misappropriation. Judge Ingraham said when the *Havana Central R. R. Co.* case was in the Appellate Division (*Havana Central R. R. Co.* v. *Knickerbocker Trust Co.*, 135 App. Div., p. 316):

"On its face this is clearly a transaction by which Van Voorhis was abstracting money from the treas-

ury of the company to be credited to his individual account with the defendant. Certainly any bank officer looking at this check would see that Van Voorhis had drawn or was attempting to draw from the plaintiff's deposit account the sum of money there named to be paid to his own order. * * * A person having an individual claim against Van Voorhis and receiving in payment such a check to pay Van Voorhis' individual debt would clearly have notice that Van Voorhis was using the funds of the plaintiff to pay an individual debt for which the plaintiff was not responsible. In this case Van Voorhis went to the bank, presented three checks drawn by the plaintiff, acting through himself as treasurer, payable to his own order, and indorsing them deposited them with the defendant, which defendant accepted and received the proceeds. By that transaction the defendant became the owner of the check and its proceeds and became personally indebted to Van Voorhis individually for the amount of the checks. The effect of this transaction, of which the defendant must be chargeable with notice, was that the plaintiff's money had been taken from its possession and control and transferred to the defendant corporation, who in return for the payment of that money to it had become indebted to Van Voorhis individually for the amount that it received. This, it seems to me placed the defendant in the same condition as if Van Voorhis had actually used the check or its proceeds to pay all individual indebtedness to the defendant with notice to the defendant of the actual ownership of the money or check used for that purpose."

The same Justice said in *Niagara Woolen Company* v. *Pacific Bank*, 141 App. Div. 265, 268-269:

> "In *Havana Central R. R. Co.* v. *Knickerbocker Trust Co.* (*supra*) I stated the reasons which satisfied me that there could be no distinction between a case where the bank received the money in payment of a debt to itself and a case where it received the money and paid it out upon the private direction of the agent or trustee for his own individual purposes, and it is unnecessary that I should restate them here. But applying the principle which the Court of Appeals has now definitely stated to be the law of this State, as illustrated in *Ward* v. *City Trust Co.* (*supra*), namely, that the question is merely one of notice to the bank, it seems to me that it can make no difference whether the bank knew that Horowitz was applying the proceeds of the checks belonging to plaintiff to his own debt to the bank or to satisfy his private obligations to others; that in either case, where inquiry would have at once disclosed the limitations of Horowitz's authority and that he was misappropriating the property of the plaintiff, the bank cannot deliberately shut its eyes to facts which upon their face show a misapplication and thus aid a defaulting officer or trustee in securing the proceeds of his defalcation. The reversal by the Court of Appeals of *Havana Central R. R. Co.* v. *Knickerbocker Trust Co.* (198 N. Y. 422) recognizes this rule."

Defendant argues (Brief, p. 9) that "the bank has the right to assume that a fiduciary will apply the funds to their proper use under the trust". Defendant's theory is that it was entitled to assume that the transfer of the funds by Cahan, Jr., from the plaintiff's account to his individual

account was done for the plaintiff's benefit and in his interests; and that it was entitled to assume that Cahan, Jr., would use the fiduciary funds, though mingled with his personal funds, only for his principal's purposes

We submit that such an assumption flies in the face of manifest probabilities. The very difficulty of imagining any reason why the principal's interests would be promoted by transfer of his funds to his agent's individual bank account is sufficient evidence of the violence of the assumption. The principal has his own account. The agent has power to draw checks upon it to satisfy any of his principal's obligations. If, for some legitimate reason, it is important to keep the principal's name out of the transaction, a cashier's draft may be used. And in view of the improbability that the principal has authorized or desired the transfer of his funds to the agent's individual account, what basis is there for the assumption that the agent will use them only for his principal's benefit? Experience teaches that a transfer by a fiduciary to his individual account of funds to which he is not individually entitled is usually the first step in a misappropriation.

But defendant says (brief, pp. 15-16), "For aught the bank would know, though a check is payable to its depositor in a representative capacity, the money would belong absolutely to him," and then goes on to suggest that such checks might have been for Cahan, Jr.'s salary or family living expenses, or might have represented money already paid out by him in discharge of his fiduciary duties. But is the Bank entitled, under the decisions, to make this assumption? Manifestly, if as against the plaintiff the money belonged to Cahan, Jr., he was entitled to do with it as he pleased. He would have as much right to use it in payment

of an individual indebtedness to the Bank as for any other purpose. We submit that it is quite inconsistent to argue that the Bank is not entitled to assume that the money rightfully belongs to a fiduciary when it takes it in payment of an indebtedness owed to it, but is entitled so to assume when it deposits it to the fiduciary's individual account and so places him in a position to use it for the payment of his individual indebtedness to others.

(b) The rule is attended with a minimum of inconvenience.

The consideration of the questions involved in this action have in the past often been clouded by the insistence of banks that to apply to them rules which would ordinarily govern similar transactions between individuals is impracticable because of the volume of business which banks conduct and the speed with which their transactions are necessarily consummated. The impression has been sedulously cultivated that the rule of the instant case, when applied to banking institutions, must break down because of impracticability of enforcement.

It may well be queried to what extent the argument from inconvenience has a place in determining the decision of this case. Certainly this Court will not on such an argument disregard established legal principles. In *United States* v. *National Exchange Bank*, 270 U. S. 527, this Court said (pp. 534-535):

> "If this be true, then when the United States issues an order upon itself it has notice of the amount and when it comes to pay to an innocent holder making a claim as of right it is at arm's length and takes the risk. We are of opinion that the United States is not excepted from the general rule by the large-

> ness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt."

Lord Justice Scrutton in *A. L. Underwood, Limited* v. *Bank of Liverpool*, [1924] 1 K. B., 775, 793, said:

> "If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customer the risk of liability because they do not inquire."

And in *Colonial Bank* v. *Cady and Williams*, L. R., 15 A. C. 267, 282, Lord Bramwell delivered the following pungent pronouncement:

> "One word on the alleged hardship on the defendants. I think there is none. I think they ought to have inquired as to these instruments. It is said business could not be transacted if that were necessary. The same thing was said when Lord Sheffield's case was decided. But, as has been shrewdly observed, such business is as lively as ever. I repeat my remark during the argument. Shopkeepers have said, when suing a husband, that they could not possibly ask the wife if she had his authority to pledge his credit—she would be offended. An excellent reason for not asking her, but not for making him pay."

We shall assume, however, that in the face of a conflict of authority, considerations of practicability and convenience may be given some weight.

Is there then anything in this spectre of impracticability which defendant's brief seeks to raise? We submit that, apart from the exigencies of those particular banks which,

like defendant, have become involved in liability through failure to observe it, the principle for which we contend is the most practicable and the least inconvenient which it is possible to devise in the present state of the authorities.

The rules which govern the liability of banking institutions should, above all, be simple and intelligible to paying tellers and receiving tellers and second assistant trust officers who are the persons by whose acts, omissions or knowledge the liability of the bank is usually determined. A consistent rule, which is definite and understandable, is infinitely preferable to an apparently more lenient one, which involves so many complications, exceptions and distinctions as to be quite unintelligible to an employee with no legal knowledge.

In this view we see no inconvenience in a rule which would require banks to give general instructions to their tellers not to permit, without special authority based upon adequate inquiry, the deposit to individual credit of a check drawn or endorsed by a fiduciary in his fiduciary capacity. Nor, the rule being once established, do we perceive any possibility of embarrassment as between banks and their customers. Banks are now obliged to explain to their depositors that under the law they cannot take fiduciary funds in payment of an individual indebtedness of the fiduciary. We can see no greater embarrassment in a tactful explanation that under the law the bank cannot, without adequate evidence of its propriety, take fiduciary funds for deposit in the fiduciary's individual checking account.

Such a rule is far less burdensome than the consequences of the decisions upon which defendant relies. Banks by no means escape inconvenience by establishing a

doctrine that they are entitled to receive deposits of fiduciary funds in the fiduciary's individual account. The principle that the form of the check charges the bank with notice that the funds are fiduciary funds is too deeply rooted now to be questioned. And that universally accepted principle makes the acceptance by the Bank of such a deposit a source of danger for an indefinite time to come. The resulting inconvenience is demonstrated by some of the cases upon which defendant most strongly relies.

In *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, one Poggenburg, who was an executor of an estate, kept an estate account in the Bowery Bank. He maintained an individual account in the defendant Yorkville Bank. He deposited in this individual account various checks drawn by himself upon the estate account. The Court of Appeals said (p. 110) that although the method adopted by Poggenburg was "unwise and hazardous", the deposit in itself "did not overpass the legal right of the executor or the defendant".

But here the troubles of the bank began. Poggenburg drew checks on this individual account to such an amount that nothing was left in the account, as the Court held, except estate funds. He then drew a check on this individual account to the order of the defendant bank in payment of a loan which he had individually contracted with it. Then, after making this and other payments upon his individual indebtedness to the bank, he drew other checks to third persons for other personal purposes of his in which, however, the defendant bank was in no wise interested. The Special Term and the Appellate Division granted the plaintiff, who was the substituted executor, recovery for all of the funds withdrawn from the Bowery Bank and deposited in the defendant bank except a small sum which had

not been misappropriated. The dissenting justice in the Appellate Division declared that the recovery should have been only for such sums as Poggenburg paid the defendant bank in liquidation of his individual indebtedness. The Court of Appeals differed from both of the above views. It held that the defendant originally had "the right to presume that the fiduciary will apply the funds to their proper purposes under the trust". But the Court of Appeals also held that the defendant bank "knew at all times that the credits created by the deposits of those moneys, through the checks of the executor, were equitably assets of the estate" and that "trust funds do not lose their character as such by being deposited in a bank for the individual credit and account of the person who is trustee"; that with this knowledge the bank "had not the right to participate in a diversion of them from the estate" and that it did participate in such a diversion either by "(a) acquiring an advantage or benefit directly through or from the diversion, or (b) joining in a diversion, in which it was not interested, with actual notice or knowledge that the diversion was intended or was being executed, and thereby becoming privy to it" (pp. 111-112). The Court of Appeals therefore held that the moment Poggenburg drew a check on his individual account to the defendant in payment of his individual indebtedness to it, the defendant could no longer "presume" that he was using that account for estate purposes and that the defendant was accordingly liable not only for the checks which it received in satisfaction of the indebtedness, but for every check drawn by Poggenburg after the first check so received by the defendant (pp. 113-114).

The inconvenience of this rule is obvious. Poggenburg's account with the defendant was an individual account.

Once give the bank the right to accept fiduciary funds in such an account, as a practical matter it is bound to accept them. It cannot decline without serious affront to its depositors. But the account being in the bank as an individual account, how is the bank to know, when the individual funds in the individual account have been expended and nothing but fiduciary funds remain? How impracticable to expect a junior employee, who is offered a check on an individual account of a depositor in payment of his individual indebtedness to the bank, to investigate whether that account, in spite of its apparent character, may not actually contain fiduciary funds which the bank has no right to take. What a serious inconvenience it is, when a check is drawn by the depositor on that account to a third person with whom the bank has no connection, to inquire before honoring it whether the bank may not have prior thereto received fiduciary funds in payment of the depositor's loan or overdraft.

In comparison with the inconvenience of the rule of the *Bischoff* case, the one for which we contend is simplicity itself. That rule would stop the evil at its source. The defendant bank would never have received fiduciary funds in the individual account and would never have been confronted with the problems which arose after their receipt.

Other cases in which a bank has been held liable where it has permitted a fiduciary to deposit checks showing on their face that they are drawn on fiduciary funds to the credit of his individual account and later has received checks from that individual account in payment of the fiduciary's indebtedness to it are *Hale* v. *Windsor Savings Bank*, 90 Vt. 487; *Brown* v. *Kyle*, 166 Wis. 347; *American Bonding Co.* v. *Fourth National Bank*, 205 Ala. 652, 206 Ala. 639,

640. The theory of all these cases is that where a fiduciary mingles fiduciary funds with his own and then draws checks on the mingled fund for his personal uses, it is presumed that his personal funds are first withdrawn (see *National Bank* v. *Insurance Co.*, 104 U. S. 54, 68), so that, when the account has been diminished to an amount not greater than the amount of fiduciary funds deposited therein, the subsequent withdrawals are from the fiduciary funds. Where the check deposited in the individual account shows on its face that it represents fiduciary funds, the bank is on notice, through the sight of the check by its receiving teller, of the fact that fiduciary funds have gone into the individual account; accordingly when the account has been diminished to the amount of the fiduciary funds and then a check is drawn by the fiduciary to pay his individual indebtedness,—albeit weeks or even months thereafter,—the bank is on notice through its bookkeepers and paying tellers that fiduciary funds are being used to pay the fiduciary's individual obligations. This rule is established by the overwhelming weight of authority.

Referring to the fear expressed by Judge Hough in the Court below that the rule adopted would be a hard one "not only in the financial institutions of the populous and busy city, but perhaps even more so in smaller communities, where men are more widely known by reputation and are more influenced by personal reputations than can be expected in the crowds of a cosmopolis" (R., p. 282), we submit that the desirability of the simple rule for which we contend is often more apparent in smaller communities than in metropolitan centers. It is in the smaller towns, where the personal and business affairs of everyone are well known to his neighbors, that the unquestionable rule

of the imputation of notice to a bank through the knowledge of its employees most seriously increases the hazards of accepting fiduciary funds for individual credit. Checks to the order of "Smith & Jones" or "Brown & Co.," which in New York City would have no suspicious significance, would be known by bank employees in a smaller community to be for the depositor's personal uses.

But in any community, large or small, it is manifestly impracticable for the bank to keep its tellers so advised of the state of an individual account in which trust funds have been mingled as to guard against liability for permitting their diversion. Unless, in addition to being permitted to accept the funds for individual credit, banks were also permitted to honor without liability any withdrawal thereof for any purpose,—which is manifestly impossible under the authorities,—the most convenient and workable practice is to refuse such deposits altogether unless satisfied of their propriety by adequate inquiry.

SECOND: The above rule applies a fortiori to agents who have no legal title to funds and upon whose authority the law imposes limitations, against use thereof for their own purposes, which all persons dealing with them are bound to notice.

It may be said that the deposit by an agent in his individual account of checks drawn by him in his principal's name to his own order or to the order of his depositary bank, is no more suspicious than such a deposit by any other fiduciary. It is true, however, that in the case of trustees, executors, guardians and other fiduciaries who have legal title to the funds under their control, it is pos-

sible to state reasons in attempted justification of such a deposit which do not apply to agents, who have no such title and who act by procuration only.

> "The title to the funds was in the executor, and he possessed the full control and disposition of them." (*Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, 110.)
>
> "The executor was the owner. Whether he deposited in his own name or with the addition of the name of the estate, the title was unchanged." (*Whiting* v. *Hudson Trust*, 234 N. Y. 394, 406.)
>
> "The difference between the agent and trustee is that one holds the legal title and the other does not; one has full power to deal with the property, the other has only a limited power, depending upon the terms of the agency." (*Zane, Banks and Banking*, p. 217.)

It is such considerations as these that have led some courts in the case of a fiduciary who has legal title to the fund in question to say that it makes no legal difference, so far as the depositary bank is concerned, whether that fund is deposited in his name with the designation "Trustee" or "Executor" or in his individual name.

The distinction between such fiduciaries and agents is not only a legal one, but a practical one. The estate can act only through its executor or trustee. Therefore, in the case of an executor or trustee or other fiduciary who has the legal title, it may be argued that, practically as well as legally, the control of the fund remains the same when it is deposited in the individual name of the executor or trustee. But a principal may act himself or through other agents, and, therefore, if one agent deposits the principal's fund to his individual credit, the control of

the fund is vitally changed. Then only that agent can act with respect to it. It is taken out of the control of the principal.

Defendant says (Brief, p. 8) "The deposit with the defendant bank did not operate to take the funds out of his son's control". But it did take them out of plaintiff's control. While the funds were on deposit with the Guaranty Trust Company and the Agents of the Bank of Montreal, the plaintiff could himself draw checks upon them. He could also by mere revocation of the powers of attorney deprive Cahan, Jr., of all power over them. But once they were transferred to Cahan, Jr.'s individual account, plaintiff's control ceased. The defendant bound itself by its contract of deposit to honor any check that Cahan, Jr. might draw, and none which anyone else, even his principal, the plaintiff, might draw.

(a) Cahan, Jr., did not have actual authority either to draw checks for his own benefit or to dispose for his own benefit of the checks when drawn. He had no apparent authority to do these things as to any third person who was put on notice that he was acting for his own benefit.

Into every power of attorney or authorization to an agent to act "for", "on behalf of", or "in the name, place and stead of" a principal, the law reads the limitation that the power of attorney or authorization is not to be construed as including authority to use it for the agent's own benefit unless there be express language to that effect. In *Bank of New York* v. *American Dock and Trust Company*, 143 N. Y. 559, 564, the Court of Appeals, Judge Peckham writing, thus laid down this fundamental rule of agency:

> "It is an acknowledged principle of the law of agency that a general power or authority given to

the agent to do an act in behalf of the principal, does not extend to a case where it appears that the agent himself is the person interested on the other side.

"If such a power is intended to be given it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time."

The same rule was stated by Judge Sanborn, writing for the Circuit Court of Appeals for the Eighth Circuit, in *Park Hotel Co.* v. *Fourth Nat. Bank of St. Louis*, 86 Fed. 742, 744, as follows:

"And while a promissory note, made by an agent or officer having such authority, in the usual form, and taken by a stranger in the ordinary course of business, carries with it the presumption that it was issued for corporate purposes, and under lawful authority, a note issued by such an agent, payable to himself, is accompanied by no such presumption, but is itself notice that it is without the scope of his general power, and that it does not bind his principal, unless its execution was specially authorized by the corporation, through its directors or officers, other than the agent to whom it is payable. Such a note is a danger signal, which the discounter or purchaser disregards at his peril. It is notice to him that, if it is contested, he cannot recover upon it, under any general authority in the agent, or at all, unless he proves that the agent was specially authorized to make that particular transaction, or to make contracts of the corporation with himself."

Judge Wallace in *Anderson* v. *Kissam*, 35 Fed. 699 (C. C. S. D. N. Y.), said, p. 703:

> "Therefore, if there is any significance in the fact that a bank president or cashier offers negotiable paper of his corporation, made by him in his official character, in payment of his personal debt, or to raise money for his personal use, it matters not that bankers generally do not appreciate it. • • • When he comes with money obligation of a corporation, which is the contract of a corporation only because he has made it, and which is not its contract if he has made it without authority, the transaction is a very different one."

It is not necessary to take issue with the rule laid down in *North River Bank* v. *Aymar*, 3 Hill, 262, or in the other cases cited by defendant, which follow it. *North River Bank* v. *Aymar* did not hold that the agent there involved had actual authority to make the notes in question, but simply that third persons who had no notice that he was acting outside of his authority and who took the notes for value could enforce them. The case must be read in connection with that of *Stainer* v. *Tysen*, 3 Hill, 279, decided at the same term. The net result of the two cases is that in neither did the agent have actual authority to issue or dispose of the notes in question; that the plaintiffs in *North River Bank* v. *Aymar* being unaffected by notice were protected by his apparent authority; but that the plaintiff in *Stainer* v. *Tysen*, who did have notice that the agent was transcending his actual authority, could not rely upon apparent authority. In *North River Bank* v. *Aymar*, Judge Cowen said (p. 266):

> "There is nothing in the nature or effect of such a power which authorizes the attorney to use it for

his own benefit or the benefit of any one excepting the principal. And if this limitation be such that an appointee would be bound to notice the fact that the attorney overstepped it, then these plaintiffs were properly cut off by the court below from their claim upon the contested notes and endorsements."

And in *Stainer* v. *Tysen* the same Judge said (pp. 280, 282):

"The argument by which those who advance money or discharge debts on the faith of paper executed under letters of attorney like this, claim that the principal should be bound at all events, is, that he has authorized another in general words and without any qualification to give his notes. * * * Some of us felt so much difficulty upon this argument in *The North River Bank* v. *Aymar*, that we held the question under advisement, and directed a second discussion, which took place in the course of the same term at which the present case was argued. (May term, 1842.) The answer given to the argument is, that such letters of attorney import, in their own nature, an obligation to act for and in behalf of the principal and in his proper business; * * *

"There is no doubt that a power drawn up nakedly to do acts for and in the name of the principal, negatives all idea of interest in the agent, or authority to act for the benefit of any one beside the principal. This limitation, therefore, the plaintiff was bound to notice."

And in *Bank of New York* v. *American Dock and Trust Company*, from which we have quoted (*supra*), the Court of Appeals held that where a corporation by-law gave its President general authority to issue warehouse receipts and the President purported to issue such a receipt as collateral

security for an individual debt, the creditor was not entitled to regard that act as within the President's authority. Judge Peckham said (143 N. Y., p. 565):

> "There was no actual or apparent authority conferred upon Stone to receipt for the defendant in any case in which it appeared that he was the person who deposited the cotton;"

A more recent application of this principle is *Porges* v. *United States Mortgage & Trust Co.*, 203 N. Y. 181, 190, where the Court said:

> "Conceding to Hoyt the power, under the instrument, to indorse the check in the name and behalf of plaintiff, his indorsement thereof for his personal use and gain was not within that power. If the power of attorney, invoked by defendant, did establish the power and right of Hoyt to effect plaintiff's indorsement of the check, it established at the same time that the depositing of it in and the receipt of it by the defendant for the credit and account of Hoyt exceeded his agency and authority. A power to act for another, however general its terms, or wide its scope, presupposes integrity and faithfulness in its exercise and cannot be enlarged by implication or construction to the justification of a diversion to the use of the agent of moneys or property subject to the agency. Manifestly this instrument did not transfer to Hoyt the ownership of the property to which it related. By virtue of it Hoyt was the plaintiff's attorney or agent with the powers it contained and for the purposes it prescribed. The law will not permit an attorney or agent under color of the authority bestowed by his principal to apply the property of that principal to his own use. That is a breach of trust which a court will not sanction or tolerate."

The decision of this Court cited by defendant under this head (*National Safe Deposit Co.* v. *Hibbs*, 229 U. S. 391) is wide of the mark. That involved stock certificates standing in the name of a third person and by him endorsed in blank; neither the face of the certificates nor any extrinsic circumstance gave the slightest notice of an agency or other fiduciary relation.

Authorities upon this general principle might readily be multiplied. They are summed up in the following passage from 2 *Corpus Juris*, 642-643:

> "The broadest possible authority to make and indorse paper presumptively is to be exercised in the principal's interest only, and does not impliedly extend to making or indorsing paper for the accommodation of third persons, and still less for the agent himself. Accordingly, in the absence of a very clear showing of such authority, an agent has no power under the broadest terms in the letter of appointment to make or indorse negotiable paper for his own interest, in the name of his principal, or for his own interest and that of the principal. • • • The principal will not, however, be bound if the third person knew, or if the transaction showed upon its face, that the agent made the paper for his own use or for the accommodation of a third person, for these are acts that are not authorized, and on their face carry to the third person knowledge of that fact; and if the paper is made payable to the agent himself it should put third persons on guard as to the agent's authority and the purposes for which he is using his principal's credit."

Applying the above principles to the instant case, these twenty-one checks were utterly unsupported by any actual authority. As they were drawn for no purpose of plain-

tiff but for Cahan, Jr.'s individual benefit, there was no actual authority even for drawing them. And apparent authority disappears the moment the third person has notice that the actual authority is being transcended. The question, therefore, is always one of notice, and Cahan Jr.'s tender of these checks, drawn by himself as attorney in fact, to his own order, for deposit in his individual bank account, was sufficient notice that he was using his principal's funds for his individual purposes and hence was transcending the actual limits of the authority entrusted to him by the plaintiff.

(b) The weight of authority, with respect to agents, is that they are not entitled to deposit their principals' funds to individual credit, and that a bank which permits such a deposit is liable for a resulting misappropriation.

Most of the cases cited by defendant in the list appearing on pages 8 and 9 of its brief are cases of fiduciaries who had the legal title. Defendant does not contend otherwise. The only cases which defendant cites as holding that an agent or corporate officer may deposit the funds of his principal in an individual bank account are collected at page 14 of its brief.

On examination, however, it will be found that few even of these cases sustain the proposition. The New York authorities will be separately considered in the next subdivision. Of the other citations, *Safe Deposit & Trust Co. v. Bank*, 194 Pa. St. 334, involved an administrator, who of course had legal title. *Goodwin v. American National Bank*, 48 Conn. 550 is likewise miscited. While the fiduciary involved in that case was both an executor and a town treasurer, only his defalcations as executor were involved; his

defalcations as town treasurer were described only to show the manner in which the estate funds had been misappropriated.

Charleston Paint Co. v. *Exchange Banking & Trust Co.*, 129 S. C. 290, did not involve an individual deposit. The criticism there was that the attorney had placed the check in an account entitled "R, Attorney" instead of "R, Attorney for Charleston Paint Company". The discussion of the right of the agent with respect to deposit was all dictum. The holding was that if the check was materially altered it amounted to a forgery and the bank was not a holder in due course, and a judgment in the bank's favor was reversed for erroneous instructions to the jury with respect to that issue.

The Missouri cases cited are far from holding the broad principle asserted by defendant. In *McCullam* v. *Third National Bank*, 209 Mo. App. 266, the Court said (pp. 279-280, 281):

> "Indeed, circumstances may attend the shifting of corporate funds to the officer's personal account which would afford adequate notice to the bank to reasonably support the inference that misappropriation was intended. • • • The facts in a given case, of course, and, indeed, only slightly different from the facts here, may be such as to place the bank on guard."

The Court, however, held that the circumstances in that case were such as to negative notice. There was evidence that a large part of the corporation's business was transacted through the officer's personal account, because of the fact that the corporation was failing and was heavily indebted to its own banks. It was shown that another officer

of the corporation knew of and acquiesced in these transfers, and indeed there was no proof that the officer in question had in fact misappropriated anything. The other Missouri case cited, *Gate City Building & Loan Association* v. *National Bank*, 126 Mo. 82, involved a similar state of facts. The "general fiscal agent" of the plaintiff association had a personal account and an association account with the same bank, the defendant. He had for a long time endorsed checks which had been made to the order of the association, sometimes into the one and sometimes into the other account, without objection by the other officers, and had customarily adjusted the two accounts by drawing checks on his personal account to the credit of the association account.

The English case of *Corporation Agencies, Ltd.* v. *Home Bank of Canada*, which the defendant prints in an appendix to its brief, has several distinguishing features. In the first place the checks, under a by-law of the plaintiff corporation, were signed by another officer of the corporation in addition to the one to whose individual order they were made payable. The case was not, therefore, one in which, as Judge Wallace said in *Anderson* v. *Kissam*, 35 Fed. 699, 703, the officer "comes with money obligation of a corporation, which is the contract of a corporation only because he has made it."

A further distinction is found in the ground of decision stated by the Privy Council in the portion of its opinion which appears at pages 36-37 of defendant's brief:

> "Moreover, the fact was that the plaintiff's moneys were not being appropriated and applied by Cahan, Junior, at all. His father's moneys and the moneys of the various companies on whose accounts

> he was entitled to draw and did draw were no doubt being misappropriated, but so far as the plaintiffs were concerned Cahan, Junior, was doing no more than paying into their account moneys which did not belong to them and drawing out to the like amount moneys with which the Company, in fact, had no concern. Neither the payments into nor the drawings out of the Company's account were authorized acts. The Company cannot repudiate the one and take the benefit of the other."

The above analysis leaves only the *Santa Marina* case in the Federal Court, and the authorities cited from New York (which will be hereafter discussed), Massachusetts and Washington as authorities for the rule asserted by defendant, against which may be cited all of the cases which appear at pages 7 to 8 under Point First of this brief. Most of these cases involved agents, and the few of them which involved fiduciaries who had legal title are of course *a fortiori* authority for our contention.

Judge Story in his book on Agency says, Section 208:

> "Thus, in regard to agents receiving money for their principals, it seems (as has been already suggested), a clear duty, if they deposit the money in the hands of bankers, to deposit it in the name of their principals, and not in their own names; and if they adopt the latter course, and the bankers should become insolvent, the agents would become personally responsible for the loss."

That such a deposit amounts to a conversion both by the agent and his depositary bank has been frequently held.

Wagner Trading Co. v. *Battery Park National Bank*, 228 N. Y. 37, was an action at law for conversion, in which it appeared that Wagner, the President of the plaintiff corporation, who had general authority to endorse paper, endorsed cashier's checks, drawn to the order of the plaintiff, "Wagner Trading Company, C. J. Wagner, Pres.", and deposited them in his personal account with the defendant bank which paid out the proceeds thereof on his personal checks. There was no use of the funds to pay any personal indebtedness of Wagner to the bank. The Court of Appeals held the bank liable for the resulting misappropriation, saying (pp. 41-42):

> "The facts showing the conversion are complete. Wagner had authority to indorse the checks, although no by-law or resolution is in evidence to that effect, but only for the purposes of the corporation's business and not to transfer the checks to himself personally or for his personal use. The defendant endeavored to prove estoppel and negligence of the plaintiff. The trial court rightly excluded all such evidence. The plaintiff had no relations with and owed no special duty to the defendant. It was not a depositor of the defendant. * * * When it accepted the checks payable to the plaintiff and indorsed by Wagner as president of the plaintiff for deposit to the account of Wagner himself, it did so at its peril to ascertain whether Wagner had authority to indorse them and by his indorsement transfer the money to be paid thereon to his personal account. (*Cheever* v. *Pittsburgh, S. & L. E. R. R. Co.*, 150 N. Y. 59; *Ward* v. *City Trust Co. of N. Y.*, 192 N. Y. 61, 71.) If Wagner had no such authority, title to the money in question never passed to the defendant and if it received it, it did so without authority and must account and make payment to the owner. (*Schmidt*

v. *Garfield National Bank*, 64 Hun, 298; affirmed, 138 N. Y. 631; *Sims* v. *U. S. Trust Co. of N. Y.*, 103 N. Y. 472; *Fidelity & Deposit Co. of Maryland* v. *Queens County Trust Company*, 226 N. Y. 225, 233.)"

And in *Porges* v. *United States Mortgage and Trust Company*, 203 N. Y. 181, *supra*, in which one Hoyt, the agent under power of attorney of an individual principal, did the same thing, the court held that the agent was guilty of a conversion of the check and that it was equally clear "that defendant [his depositary bank] did, by receiving the check for the credit of Hoyt and collecting and receiving its proceeds, convert the check, unless the acts of Hoyt in relation to it were within his agency."

See also *E. Moch Co.* v. *Security Bank*, 176 App. Div. 842, 846 (affirmed without opinion in 225 N. Y. 723); *A. L. Underwood, Ltd.* v. *Bank of Liverpool*, [1924] 1 K. B. 775, 790, 795-796.

(c) The New York decisions.

It is not too much to say that the decisions of the New York State courts upon this question are now in a condition of utter confusion.

Until the case of *Havana Central Railroad Co.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422, the New York authorities had been entirely consistent. In *Sims* v. *United States Trust Company*, 103 N. Y. 472, which was an action at law, it appeared that the plaintiff, who had an account with the Peoples' Bank, drew thereon a check to the order of the defendant trust company and gave it to his agent with verbal instructions to deposit it to plaintiff's credit with the defendant. Instead of doing so, the agent delivered the check to defendant and took from it a certificate of

deposit payable to himself as trustee for the plaintiff and thereafter drew out the money and converted it to his own use. The Court of Appeals held the defendant Trust Company liable, saying (pp. 475-476):

> "The check upon its face imported the ownership of the moneys represented in it by Dr. Sims, and his desire that its custody should be transferred from the People's Bank to the defendant. This certainly did not warrant the defendant in supposing that Dr. Sims thereby intended to pay $5,000 to Crowell, or place him for any purpose in possession of the fund. If he had so intended, the check would have been made payable to Crowell's order, and there would have been no need of the agency of the defendant in the transaction. The use of the defendant's name as payee of the check indicated the drawer's intention to lodge the moneys in its custody and place them under its control, and nothing further than this was inferable from the language of the check."

This language is directly applicable to the three checks, aggregating $7,500, which Cahan, Jr., drew as attorney in fact to the order of the defendant. Their signature "C. H. Cahan, by C. H. Cahan, Jr., his attorney" "imported the ownership of the moneys" represented thereby in the plaintiff. There was nothing in Cahan, Jr.'s possession of those checks which gave the defendant any right to suppose that the plaintiff intended them to be credited to Cahan, Jr.'s, individual account. If Cahan, Jr., had any authority to draw the checks, the natural presumption would be that the plaintiff intended him to draw them for the purpose of opening an account in his (plaintiff's) name, with the Empire Trust Co.

Following the *Sims* case, came an important line of Court of Appeals decisions holding the bank liable where it took checks in payment of the agent's individual indebtedness to it (*Gerard* v. *McCormick*, 130 N. Y. 261; *Rochester & Charlotte Turnpike Road Co.* v. *Paviour*, 164 N. Y. 281; *Ward* v. *City Trust Co.*, 192 N. Y. 61) as well as the case of *Spaulding* v. *Kelly*, 43 Hun, 301 where the indebtedness feature did not appear.

Then came the *Havana Central* case in which, as we have shown above, the Special Term and the Appellate Division held that the fact that the funds after having been deposited in the agent's individual account were checked out in payment of his personal obligations to third persons rather than to the bank itself made no difference with respect to the bank's liability for the misappropriation which had been directly made possible by the individual deposit. The decision of the Court of Appeals in the *Havana Central* case was that the depositary bank's conceded duty of inquiry was satisfied by the honoring of the checks by the *drawee* bank, which amounted to a "representation" by it as the "agent" of the principal that the checks were "all right." This decision was a "sport", which seriously confused the New York law.

The Appellate Division in the later case of *Niagara Woolen Co.* v. *Pacific Bank*, 141 App. Div. 265, held the bank liable in a case in which the fiduciary account and the individual account were in the same bank, so that there was no separate drawee bank to make representations as the agent of the depositor. That case was never appealed to the Court of Appeals. There followed *Porges* v. *U. S. Mortgage & Trust Co.*, 203 N. Y. 181, where again it was impossible to rest upon the "agency" of the drawee bank because

the check which was deposited in the individual account of the agent was one drawn to the order of the principal, endorsed by the agent in the principal's name and again by the agent individually and deposited in his personal account. The bank was again held liable.

Then came *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, already abstracted, which involved an executor who had legal title. The Court of Appeals said that the bank might legally take a deposit of the trust fund to the fiduciary's individual account and credit, but, as we have shown, held the bank to a logical, albeit strict, standard of care with respect to the manner in which it might permit the executor to deal with the fund once it was so deposited. The next case was *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y. 225, which involved a trustee in bankruptcy who also had legal title to the funds. Then came *Wagner Trading Co.* v. *Battery Park National Bank*, 228 N. Y. 37, which held that the bank had been guilty of conversion when it permitted a corporate officer to deposit in his individual account the check of a third person drawn to the order of the corporation, and endorsed in the corporation's name by himself as agent. Here again the facts did not permit recourse either to the legal title theory or to the "rule" of the *Havana Central* case regarding the agency of the drawee bank.

The only other case of importance in the Court of Appeals is *Whiting* v. *Hudson Trust Company*, 234 N. Y. 394, where an effort to clarify the confusion of the prior cases only led to further obscurity. That case involved misappropriations of checks drawn by one E. in two different forms. The first was drawn by E. as "attorney in fact" to his own order as "trustee" and deposited with

the defendant trust company as the opening deposit in a new account designated "special". The first distinction to be noted is that such a deposit in a new "special" account is quite different from a deposit in a current individual account. Apart from this distinction the facts as to this transaction were substantially the same as those involved in the *Havana Central* case. The Court of Appeals knocked every prop from under the *Havana Central* decision by recognizing the error of its fundamental conception that the drawee bank was the plaintiff's agent. But it avoided a flat disagreement with the result of that case, by attributing to the fact of certification the consequence that the taker of the check was relieved from notice or obligation of inquiry. The Court attempted to distinguish cases such as the *Porges* and *Wagner Trading Company* cases on the ground that they involved endorsements rather than the drawing of checks. The attempted distinction is unsubstantial. Bearing in mind that the question is entirely that of the extent of notice received by the depositary bank, it can make no possible difference whether the agent draws a check in the name of the principal to his own order and endorses that to the order of his depositary bank, or endorses in the name of his principal to his own order, and then endorses individually, the check of a third person originally drawn to his principal. It is then useless to argue, as defendant does (brief, p. 20), that the *Whiting* case does not go off on the fact that the check was certified. Having disagreed with the basis of the *Havana Central* decision, the Court of Appeals could not, consistently with its other decisions to which reference has already been made, have reached the result in the *Whiting* case upon any other ground.

The second class of checks involved in the *Whiting* case were drawn by third persons to the order of E. as executor of an estate and by him deposited in his "special" account above mentioned. With respect to these transactions, which involved endorsements rather than the drawing of checks, the Court's distinction of the *Wagner Trading Company* case fails, and the decision in favor of the bank must therefore rest on the ground stated by the Court that "the executor was owner" and that "the title was unchanged."

We have discussed the New York State authorities at some length because of the reluctance expressed by the Circuit Court of Appeals in this case to differ from the State Court of Appeals. We submit that when the authorities in a state court are in as chaotic a condition as the New York decisions on this question, such reluctance on the part of a national court is unnecessary.

THIRD: The facts of the present case require affirmance of the judgment whether or not the broad rule announced by the Court below is adopted.

This is not a case in which the defendant had no notice except such as was presented to its receiving teller through the form and contents of the checks themselves.

The transcript of Cahan, Jr.'s account with the defendant (Plaintiff's Exhibit 11, R., pp. 197-214) shows that it was opened on September 29, 1915, and that it had been operated with great activity for nine months and more before the first of the plaintiff's checks was deposited therein on July 12, 1916. The account was exactly the sort which would be normal to the personal checking account of a man of Cahan, Jr.'s age and position. It had no characteristic

which would give the defendant the slightest reason to suppose that it was an account operated by Cahan, Jr., for the plaintiff's benefit and purposes. Plaintiff never had any relations of any kind with defendant.

Moreover, this is not a case where it is necessary to piece together facts known by a number of subordinate employees in order to impute notice to the bank. The second check of the series was, with all its implications, brought pointedly to the attention of a responsible officer of the defendant.

Mr. Lyon, the Treasurer of the defendant, testified (R., fols. 422-431) that on August 2, 1916, (Def's. Exh. A-19, fol. 694) when Cahan, Jr's. balance was $49.98 (R. p. 204; see also fols. 307-308), he brought to the bank a check for $5,000 drawn in the plaintiff's name by himself as attorney in fact and to his own order and asked that it be credited to his personal account with defendant as a "cash item" so that he could draw on it immediately. A rule of the defendant prevented withdrawal the same day even if the deposited check was certified, unless the check was approved "for immediate credit" by an officer of the bank. If we accept Mr. Lyon's testimony, it was for that reason that this check was brought to him by the receiving teller. The transaction was thus presented as a whole to Mr. Lyon. And the transaction certainly provoked inquiry. What explanation consistent with faithfulness on the part of Cahan, Jr., was there for the necessity of these funds being taken "for immediate credit". Certainly not the necessity of paying the plaintiff's obligations. That could be done as well by the drawing of a check on the plaintiff's bank account upon which this very check tendered by Cahan, Jr.,

had been drawn. The necessity for immediate credit must have been Cahan, Jr.'s personally.

It is fairly inferable from Mr. Lyon's testimony that one reason why similar checks later presented by Cahan, Jr., were not also brought to the attention of responsible officers of the defendant was that the receiving teller, having seen the second check of the series approved without any inquiry, did not feel called upon to present the same question to him or any other officer of the defendant on subsequent occasions.

Moreover, there were three days, namely, September 1, 1916, April 12, 1917, and May 26, 1917, on each of which there was a withdrawal of such size that the balance to the credit of the account at the opening of business would not have been sufficient to satisfy the withdrawal without the deposit of one of these fraudulent checks. None of these three checks was approved "for immediate credit" under defendant's rule above referred to, and Cahan, Jr., was therefore not entitled to make withdrawals against them until the following day. It was these three occasions, and not, as defendant argues (Brief, p. 22), the three checks drawn to the order of defendant, to which the District Judge referred when he said (R., fol. 727):

> "Whether the checks were drawn to pay the agent's indebtedness to the defendant (which would seem to be the case in three instances referred to) • • •".

There was evidence to sustain that finding. The three instances referred to appear respectively in the account as follows: That of September 1, 1916, bottom of page 204; that of April 12, 1917, middle of page 209; and that of

May 26, 1917, at page 210. In the instance of September 1, 1916, the withdrawal and the credit appear upon the same line of the account, while in the instances of April 12 and May 26, 1917, the withdrawal appears on the line under that on which the deposit is entered. Mr. Banks, the auditor of the bank, testified (fols. 311-312, 314-315, 331-337) that the fact that the withdrawal appeared on the line under the deposit was some indication that the deposit preceded the withdrawal. But in view of his testimony as to the manner in which the defendant's books were kept, the inference to be drawn from the relative position of the entries of withdrawals and deposits was of slight, if any, probative value as to the actual chronology. He testified (fols. 350-360) that withdrawals were not entered at the time they were made, but checks were kept in a batch until a considerable number had accumulated; and that then the entries of the withdrawals occasioned thereby were made at the same time in alphabetical rather than chronological order. According to Mr. Banks' testimony, the fact that on September 1, 1916, the withdrawal and the deposit appeared on the same line would indicate that the transactions were contemporaneous or, as he expressly testified with respect to this transaction, that it was impossible to tell which had happened first (fols. 344-346).

In truth, each of these withdrawals created an indebtedness from Cahan, Jr., to the defendant which was not satisfied until the defendant received the funds on the deposited checks through the clearing house.

It is, of course, unquestioned law that an overdraft is no different from any other personal indebtedness and that a bank which receives fiduciary funds, with knowledge of their character, to cover an overdraft in the agent's per-

sonal account, is liable therefor to the principal. *Allen v. Puritan Trust Co.*, 211 Mass. 409; *Santa Marina Co. v. Canadian Bank*, 242 Fed. 142, 254 Fed. 391.

But even if the withdrawals on those days had not technically created "overdrafts" the result would not be changed. We have pointed out above that the reason for the rule which holds the bank liable for taking fiduciary funds in payment of the agent's individual indebtedness is not the benefit thereby received by the bank, but that such circumstance is notice to the bank that fiduciary funds are being used for the agent's personal benefit rather than for the purposes of the principal. On September 1, 1916, April 12, 1917, and May 26, 1917, the defendant had directly presented to it the question whether it would honor checks drawn by Cahan, Jr., on his individual account and it permitted such a withdrawal only because it received upon the same day,—and probably at the same moment,—checks of the plaintiff drawn by Cahan, Jr., to his own order in amounts sufficient when later paid to cover the withdrawals in question. We submit that no possible distinction can be made between such a case and that in which the deposit of fiduciary funds is made to cover an earlier overdraft in the agent's account.

The situation presented to Mr. Lyon on August 2, 1916, was essentially similar. Under the rule of *Bischoff v. Yorkville Bank*, 218 N. Y. 106, the defendant was on notice from and after August 2, 1916, that Cahan, Jr., was using his principal's funds for his individual benefit, and the rule of that case is sufficient to sustain the judgment herein as to the amount of all the checks, except the first one of July 1, 1916, for $1,000.

FOURTH: Certification or acceptance by drawee banks has no effect on defendant's duty of inquiry.

It is not necessary to devote extended discussion to defendant's argument on the effect of certification, which it bases upon *Whiting* v. *Hudson Trust Co., supra.* We might rest the discussion upon Judge Hough's answer to this question in the lower court (R. pp. 275, 283). The effect of certification as substantially equivalent to acceptance has from very early times been fairly well understood. *First National Bank of New Jersey* v. *Leach*, 52 N. Y. 350, 353; *First National Bank of Washington* v. *Whitman*, 94 U. S. 343, 345.

It is only necessary to add that the statement of the Court of Appeals in the *Whiting* case should not be regarded, as defendant puts it, as the "New York rule" relating to certification. *Whiting* v. *Hudson Trust Co.* was the result of the judicial exigency of correcting the erroneous ground assigned for the decision in the *Havana Central* case without flatly overruling it. It appears from the record that two of the checks involved in the *Havana Central* case had been certified so that in the *Whiting* case exactly the same state of facts was involved. The Court of Appeals seized upon the fact of certification to sustain a decision, the ground of which it felt obliged to disapprove.

The extract from the opinion in *Whiting* v. *Hudson Trust Company*, which defendant quotes (brief, p. 17) should not be regarded as laying down a rule that certification justifies a bank in receiving a check with its eyes shut. Suppose that Cahan, Jr., when presenting one of the certified checks here in suit for credit to his individual account,

had said to the receiving teller "You know I have no right to this money. It belongs to my father but I need it to cover margins on one of my stock speculations." Would the fact that "as between the drawee bank and its depositor the check had been paid", protect the defendant if it accepted such deposit and later honored a check by Cahan, Jr., to the order of his stock brokers? And if the above question requires a negative answer, is there any reason for a different rule of notice in the case of the tender of any certified check bearing on its face notice that it represents fiduciary funds, merely because the check has been accepted or certified?

FIFTH: The defendant was not a holder in due course under the Negotiable Instruments Law.

Defendant argues that it became a holder in due course of the checks in question. Plainly it must take this position to escape an otherwise clear liability for conversion. Cahan, Jr., legally had no right to enforce payment of these checks as against plaintiff. He had no title thereto. Cahan, Jr., could not, and did not, give to defendant a better title than he himself had, unless defendant became a holder in due course and so was protected under Section 96 of the New York Negotiable Instruments Law.

We do not propose to enter upon a discussion as to whether the defendant is to be regarded as an agent for collection or a purchaser of the checks. Assuming that it was a purchaser, it was not a holder in due course. Section 91 of the New York Negotiable Instruments Law defining a holder in due course is quoted on page 25 of defendant's brief. Neither the first, third, nor fourth, requirement is

satisfied in the present case. The checks were not "regular upon their face". *Gilman* v. *F. O. Bailey Carriage Co.*, 125 Me. 108. See quotation from *Ward* v. *City Trust Co.*, 192 N. Y. 61, 73, *supra*, p. 16. "There was a shadow on the checks, and the defendant could not, in good faith, accept them until it disappeared." *Rochester & Charlotte Turnpike Road Co.* v. *Paviour*, 164 N. Y. 281, 285-286.

Passing to the fourth requisite, the defendant had notice of defect in the title of the person negotiating the checks. Section 98 of the New York Negotiable Instruments Law provides that "when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." The title of Cahan, Jr., who "negotiated the instrument", was certainly "defective" and plaintiff established the fact. New York Negotiable Instruments Law, Sec. 94. Therefore, under Section 98, the burden of proof shifted to defendant to establish that it was a holder in due course. Defendant refers (Brief, p. 26) to Section 95 of the Negotiable Instruments Law regarding notice. This, however, does no more than codify the common law rule which has applied in New York State as well as in the federal courts.

The cases cited by defendant under its Point II at pages 27 and 28 of its brief regarding notice are totally inapplicable. They have to do with notice of facts *dehors* the instrument. *Cheever* v. *Pittsburgh, etc. Co.*, 150 N. Y. 59, was expressly distinguished in *Ward* v. *City Trust Co.*, 192 N. Y. 61, 73, in the extract already quoted (*supra*, p. 16). Moreover, this Court has said in *Angle* v. *North-Western Mutual Life Insurance Co.*, 92 U. S. 330, 342:

> "Actual notice in such a case is not required, even in suits founded upon negotiable securities,

> where the evidence of its infirmity consists of matters apparent on its face; • • •
>
> "Constructive notice in such cases is held sufficient, upon the ground, that, when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence an act of justice."

It is generally held that one who takes a negotiable instrument has notice within the meaning of Section 95 if he has knowledge of facts which put him on inquiry. *Hoberg* v. *Sofranscy*, 217 App. Div. 546. And numerous cases hold that the rule regarding the duty of inquiry of one who receives a negotiable instrument from a fiduciary is not changed or affected by this section of the Negotiable Instruments Law. See *Union Nat. Bank.* v. *Bluff City Bank*, 152 Tenn. 486, 491-3, with an extensive collection of authorities.

The courts of New York State have always enforced the rule that bad faith in the commercial sense includes a failure to inquire when the facts impose a duty of inquiry. In *Rochester & Charlotte Turnpike Road Co.* v. *Paviour*, 164 N. Y. 281, 284, the Court of Appeals said:

> "Even if his actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith and the law will withhold from him the protection that it would otherwise extend."

See also the language of the same Court in *Ward* v. *City Trust Co., supra*, and *Fidelity & Deposit Company* v. *Queens County Trust Co.*, 226 N. Y. 225, 233.

The same reason precludes a contention on defendant's part that it took these checks in good faith under the third requirement of Section 91.

Defendant's reference to the Negotiable Instruments Law therefore brings us back to exactly the same question which has been heretofore discussed: Were the facts of which the defendant had notice sufficient to impose upon it a duty to inquire whether Cahan, Jr., had authority from the plaintiff to draw these checks and deposit them in his individual bank account with the defendant? If so, defendant is no more a holder in due course under the Negotiable Instruments Law than it is protected from liability under the principles of the common law.

SIXTH: The judgment should be affirmed.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
AUGUSTUS L. RICHARDS,
BERTRAM F. WILLCOX,
HAROLD L. SMITH,
Counsel for Respondent.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 318.—October Term, 1926.

Empire Trust Company, Petitioner, vs. Charles Hazlitt Cahan. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 31, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the respondents to charge the petitioner with liability for the proceeds of checks drawn upon the Agents of the Bank of Montreal or the Guaranty Trust Company, in New York and deposited with the petitioner by the respondent's son. The respondent, a Canadian lawyer, had accounts with the two banks named and in 1916 gave to his son powers of attorney to draw checks upon them, both powers being general and with no qualification as to the purposes for which such checks might be drawn. Beginning in July of that year and from time to time down to October, 1918, the son drew checks signed with his father's name by himself as attorney against his father's two accounts, payable seventeen to his own order, three to the order of the petitioner, and deposited them to his own private account with the petitioner. All the checks but two were certified by the Guaranty Trust Company or accepted by the other bank as the case might be. Subsequently the son drew out these funds and applied them to his own use. The respondent did not discover the fraud until the end of 1919, at which time his son absconded. The petitioner had no knowledge that the son was misappropriating his father's money and no notice other than what was given by the form of the checks. The District Court and the Circuit Court of Appeals for the Second Circuit held that notice sufficient to charge the petitioner as matter of law and gave judgment against it, the Circuit Court of Appeals adding interest on the several items from

the date when they were credited to the son. 9 F. (2d) 713. A writ of certiorari was granted by this Court. 271 U. S. 653.

No doubt the question is, as was said by the Circuit Court of Appeals, a question of degree, like most questions in the law; but we are of opinion that the Court below applied too strict a rule to an ordinary business transaction. The Court itself pronounced it 'a hard rule as business is ordinarily conducted,' and seemingly adopted it as much because of authority by which it felt bound as because it confidently thought the rule right. The petitioner had notice that the checks were drawn upon the respondent's account, but they were drawn in pursuance of an unlimited authority. We do not perceive on what ground the petitioner could be held bound to assume that checks thus lawfully drawn were required to be held or used for one purpose rather than another. In the case of checks drawn by a corporation not likely to disburse except for corporate purposes there might be stronger reasons for requiring a bank to be on its guard if an officer having power to draw them deposited checks for considerable sums to his private account; but it recently has been held otherwise by the Judicial Committee of the Privy Council. *The Corporation Agencies, Limited* v. *The Home Bank of Canada* [1927] A. C. 318. And when the two parties are father and son, both of mature years and in good standing, secret limitations of the power are a pure matter of speculation into which it seems to us extravagant to expect the bank to inquire. The person reposing confidence in the son was not the petitioner but the respondent, *National Safe Deposit, Savings & Trust Co.* v. *Hibbs*, 229 U. S. 391, 397, and he himself tells us that his confidence was unlimited. He put his deposits absolutely into his son's power, and the son, if he drew currency, as he might, could do with it as he saw fit. The notice to the bank was notice only of this relation of the parties. The petitioner in permitting the son to draw out the money was permitting only what it, like the respondent's banks, would have been bound to allow even if the deposit had been earmarked as a trust. The form in which the withdrawals took place does not appear. They might have been, like the deposits, in checks to the son's own order. All that is known is that the respondent did not get the benefit of them. But we do not place our decision upon that narrow ground. For in addition to what we have said, the transactions

went on for over two years and the petitioner fairly might expect the respondent to find it out in a month or two if anything was wrong. Careful people generally look over their bank accounts rather frequently.

It is very desirable that the decision of the Courts of the United States and that of the highest Court of the State where the business was done, should agree, as was recognized by the Circuit Court of Appeals. The result to which we come restores that agreement, at least when the checks are certified or accepted by the banks upon which they are drawn, as was the case here with all but two. *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394. The certification did not import a statement by the certifying bank that, beside the right of the son to draw, established by the power of attorney, the purposes for which the checks were drawn were lawful and were known by the bank. As the Court remarks in the case cited 'The transactions of banking in a great financial centre are not to be clogged, or their pace slackened, by over-burdens or restrictions.' 234 N. Y. 406.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.